

Jeffrey L. Kandel (CA Bar No. 115832)  
PACHULSKI STANG ZIEHL & JONES LLP  
10100 Santa Monica Blvd., Suite 1300  
Los Angeles, CA 90067-4003  
Telephone: 310/277-6910  
Facsimile: 310/201-0760  
E-mail: jkandel@pszjlaw.com

Attorneys for Richard M Kipperman,  
Liquidating Trustee

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re

SAN DIEGO HOSPICE & PALLIATIVE  
CARE CORPORATION,

Debtor.

Case No. 13-01179-MM11

Chapter 11

**LIQUIDATING TRUSTEE'S MOTION  
FOR ORDER ESTIMATING CLASS  
CLAIM OF LEILANI ROSS FOR  
PURPOSES OF ALLOWANCE AND  
DISTRIBUTION; MEMORANDUM OF  
POINTS AND AUTHORITIES AND  
DECLARATIONS OF RICHARD M  
KIPPERMAN AND JEFFREY L.  
KANDEL IN SUPPORT THEREOF**

**Hearing:**

Date: November 22, 2016

Time: 3:00 p.m. PST

Place: 325 West F Street

Courtroom 1, Room 218

San Diego, CA 92101-6989

Judge: Hon. Margaret M. Mann

# TABLE OF CONTENTS

	<u>Pages</u>
I. INTRODUCTION .....	3
II. STATEMENT OF FACTS.....	5
A. Jurisdiction and Venue.....	5
B. General Case Background and Status.....	5
C. The Extended Employee Claims Bar Date .....	6
D. The Ross Emergency Motion, Draft Complaint and Ross Stipulation .....	7
E. The Class Action Complaint.....	9
F. The Ross Proofs of Claim.....	10
G. The Summary Judgement Order .....	10
III. RELIEF REQUESTED.....	11
IV. ARGUMENT.....	11
A. Claim 237 is Contingent and Unliquidated.....	11
B. The Failure to Estimate Highly Speculative Claim 237 Would Unduly Delay Administration of the Estate .....	12
C. The Court Should Estimate Claim 237 Utilizing the Procedure to Resolve Contested Matters .....	13
D. The Court Should Estimate Claim 237 at Zero (\$0).....	14
V. CONCLUSION.....	19

# TABLE OF AUTHORITIES

	<u>Pages</u>
<b>Cases</b>	
<i>Brockenbrough v. Commissioner</i> 61 B.R. 685 (W.D. Va. 1986) .....	12
<i>Gentry v. Siegel</i> 668 F.3d 83 (4th Cir. 2012) .....	19
<i>In re All Media Properties, Inc.</i> 5 B.R. 126 (Bankr. S.D. Tex. 1980), <i>aff'd per curiam</i> , 646 F.2d 193 (5 <sup>th</sup> Cir. 1981) .....	12
<i>In re Birthing Fisheries, Inc.</i> 92 F.3d 939, 939 (9th Cir. 1996) .....	16
<i>In re Craft</i> 321 B.R. 189 (Bankr. N.D. Tex. 2005).....	17
<i>In re Dynegy, Inc.</i> 770 F.3d 1064 (2d Cir. 2014).....	16
<i>In re Ephedra Products Liab. Litig.</i> 329 B.R. 1 (S.D.N.Y. 2005).....	16, 17
<i>In re Fostvedt</i> 823 F.2d 305 (9 <sup>th</sup> Cir. 1987) .....	11, 12
<i>In re Hydrox Chemical Co.</i> 194 B.R. 617 (Bankr. N.D.Ill. 1996) .....	13
<i>In re Musicland Holding Corp.</i> 362 B.R. 644 (Bankr. S.D.N.Y. 2007).....	17
<i>In re Ralph Lauren Womenswear, Inc.</i> 197 B.R. 771 (Bankr. S.D.N.Y. 1996).....	13
<i>In re Thomson McKinnon Securities, Inc.</i> 191 B.R. 976 (Bankr. S.D.N.Y. 1996).....	13
<i>In re Woodward &amp; Lothrop Holdings, Inc.</i> 205 B.R. 365 (Bankr. S.D.N.Y. 1997).....	17, 18
<i>Matter of American Reserve Corp.</i> 840 F.2d 487 (7th Cir. 1988) .....	16

<i>Ryan v. Louis (In re Corey)</i> 892 F.2d 829 (9 <sup>th</sup> Cir. 1989) .....	12
<i>Sylvester v. Dow Jones &amp; Company, Inc. (In re Sylvester)</i> 19 B.R. 671 (D.N.J. 1975) .....	12
<i>Westfall v. MII Liquidation Inc.</i> 2007 WL 2700951, at *4 (S.D. Cal. Sept. 11, 2007) .....	16

## Statutes

11 U.S.C. § 502(c)(1).....	1, 5, 11
28 U.S.C. § 157.....	5
28 U.S.C. § 157(b)(2) .....	5
28 U.S.C. § 1334.....	5
28 U.S.C. § 1408.....	5
28 U.S.C. § 1409.....	5
California Labor Code §§ 1400, <i>et seq.</i> ....	3
Worker Adjustment and Retraining Notification Act 29 U.S.C. §§ 2101, <i>et seq.</i> .....	3

## Other Authorities

1 <u>McLaughlin on Class Actions</u> § 2:10 (12th ed. 2015) .....	16
<u>Litigating Mass Tort Cases</u> § 12:18.50; (updated June 2015), David J. Molton and Paul D. Rheingold, <u>Mass Tort Issues in Bankruptcy Proceedings</u> .....	16

## Rules

Fed. R. Bankr. P. 7023 .....	4, 11, 13, 16, 17
Fed. R. Bankr. P. 9014.....	4, 11, 13, 16, 17

**TO THE HONORABLE MARGARET MANN:**

Richard M Kipperman, the Liquidating Trustee (the "Liquidating Trustee") of the Liquidating Trust (the "Liquidating Trust") of San Diego Hospice & Palliative Care Corporation, the former debtor in possession (the "Debtor" or the "Hospice") in the above-captioned chapter 11 case (the "Case"), hereby moves the Court through this motion (the "Motion") for entry of an Order pursuant to section 502(c)(1) of title 11 of the United States Code (the "Bankruptcy Code") estimating Claim No. 237-3 ("Claim 237") filed in the Case by Leilani Ross ("Ross") "on behalf of herself and all similarly situated," in the amount of zero (\$0) for purposes of allowance and distribution in connection with the *First Amended Liquidating Plan for San Diego Hospice and Palliative Corporation (June 24, 2013), as Modified on August 27, 2013 and September 18, 2013 Jointly Proposed by the Debtor and the Official Committee of Unsecured Creditors* (the "Plan") [Docket No. 609], on the basis that:

1. Claim 237 is contingent and the administration of the Case will be unduly delayed without its estimation;
2. Any claim awarded to Ross, individually, in pending state court litigation will almost certainly be covered by insurance;
3. Ross in any event is unlikely to be granted an award in the state court litigation, as the Liquidating Trustee's motion for summary judgment against Ross has been granted;<sup>1</sup> and
4. This Court should not permit Claim 237 to be prosecuted as a class action claim.

The Motion is based on this Motion, the concurrently-filed Notice of Hearing and Motion and the attached Memorandum of Points and Authorities and Declarations of Richard M Kipperman and Jeffrey L. Kandel (the "Kipperman Declaration" and the "Kandel Declaration", respectively), the arguments of counsel at the hearing on the Motion, and any other admissible evidence properly brought before the Court. In addition, the Liquidating Trustee requests that the Court take judicial notice of all documents filed with the Court in the Case.

---

<sup>1</sup> More precisely, the motion was granted in part and denied in part. However, as detailed in section II.G below, the portion of the motion which was not granted has no impact on the Liquidating Trust or the lack of validity of Ross' claims in this Case.

1           **WHEREFORE**, the Liquidating Trustee respectfully requests that the Court (i) grant the  
2 Motion, (ii) estimate Claim 237 for all purposes, including distribution, in the amount of zero dollars  
3 (\$0), and (iii) grant such other and further relief as is fair and equitable.

4  
5 Dated:   October 21, 2016

PACHULSKI STANG ZIEHL & JONES LLP

6  
7  
8 By     /s/ Jeffrey L. Kandel  
          Jeffrey L. Kandel (CA Bar No. 118532)

9           Attorneys for Richard M Kipperman,  
10          Liquidating Trustee of San Diego Hospice &  
11          Palliative Care Corporation

PACHULSKI STANG ZIEHL & JONES LLP  
ATTORNEYS AT LAW  
LOS ANGELES, CALIFORNIA

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**INTRODUCTION**

The Plan providing for the liquidation of the Debtor's estate was confirmed September 23, 2013 [Docket. No. 615]. For the past three years, the Liquidating Trustee has worked to resolve serial class action claims by a number of the Debtor's former employees ("WARN Claimants") under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101, *et seq.*, and its California counterpart, California Labor Code §§ 1400, *et seq.* (collectively, the "WARN Act"), reduced general unsecured claims by more than half, and pursued and collected significant additional assets for distribution to creditors. The Liquidating Trustee is prepared to now make a distribution to unsecured creditors. However, Claim 237 in an unspecified amount was filed by Ross "on behalf of herself and all similarly situated" only hours prior to the end of the so-called "Employees Bar Date" on September 4, 2014. Claim 237, a copy of which is attached hereto as **Exhibit "1"**, demands that the Liquidating Trustee make "[n]o distributions to any general unsecured creditors until such time as Ross's claim is determined . . .". Accordingly, the Liquidating Trustee is not prepared to make any such distributions without this Court estimating the amount of Claim 237 for purposes of distribution, presenting the classic case where administration of the case will be delayed unless the Claim 237 is estimated. This Motion asks the Court to estimate Claim 237 at zero (\$0).

Claim 237 further provides that "[a]fter the outcome of [Ross' state court] litigation is determined, Ross will return to this Court pursuant to" a stipulation for relief from the automatic stay and Plan injunction between Ross and the Liquidating Trustee filed May 2, 2014 [Docket No. 857] (the "Ross Stipulation"). A true and correct copy of the Ross Stipulation is attached to Claim 237 (Exhibit "1" hereto). The Ross Stipulation allows Ross to assert a claim on behalf of Ross, individually, and only if and to the extent insurance proceeds are insufficient to pay any judgement obtained by Ross (the "Individual Ross Claim"). However, any such Individual Ross Claim is limited to a maximum of \$2,950,000, which is below the \$3 million coverage limit of the policy insuring against claims such as those asserted by Ross and only slightly in excess of the policy's

1 current balance of approximately \$2,850,000.<sup>2</sup> In addition, Ross' claim originally was filed in the  
2 amount of \$1,300,000, far below the policy limit. See Ross Claim No. 237-2, filed September 12,  
3 2013.

4 Further, the Liquidating Trustee's motion for summary judgment against Ross in pending  
5 state court litigation has been granted in substance (the "Summary Judgment Order"). Among other  
6 things, the state court found that Ross admitted "that she repeatedly violated the [Hospice's]  
7 attendance policy", which "prevents her from establishing she performed her job satisfactorily and a  
8 *prima facie* case of discrimination." Thus, while Ross has filed a notice of appeal of the Summary  
9 Judgment Order, the only court examining the substance of the Individual Ross Claim has held that  
10 Ross cannot sustain a claim based on her own factual admissions.

11 Accordingly, the Court should estimate the Individual Ross Claim at \$0.

12 The purported "class" aspect of Claim 237 (the "Class Claim") should also be estimated at  
13 \$0. The Ross Stipulation expressly provides for the waiver of all claims by Ross other than the  
14 Individual Ross Claim as carefully prescribed in the stipulation; the Class Claim was not among  
15 those preserved by Ross. Further, the Court should find that, even had Ross not waived all claims  
16 other than those specifically preserved in the Ross Stipulation, this Court would not have granted  
17 relief from the Plan injunction to pursue a putative class action suit on behalf of those allegedly  
18 "similarly situated" to Ross, and would not have certified a class under either Rules 9014 or 7023 of  
19 the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

20 Indeed, these are singularly inapt circumstances in which to grant such relief. Among other  
21 reasons detailed below, (1) no other former employee filed a claim making similar allegations  
22 despite nineteen months in which they could do so, (2) the Class Claim allegations were added to an  
23 already extant claim by Ross a mere four hours prior to the final deadline for employee claims  
24 (which had been extended for well over a year past the bar date for other creditors in connection with  
25 the certification of a class of WARN Claimants as part of a settlement of the WARN Act claims),  
26

---

27 <sup>2</sup> Ironically, the insurance policy could only be insufficient to cover any judgement Ross might obtain in the state court if  
28 the Court permits Claim 237 to go forward as a class action so that others would then make claims against the same  
policy. Such an outcome would not only be contrary to the terms of the Ross Stipulation, but would also manifestly be  
against Ross' own best interest.



(3) the Class Claim appears to manifestly be against Ross' own interests, supporting an inference that it is likely a mere "lawyer's vehicle", and (4) granting such relief and certifying a class would further delay distributions to creditors and completion of the Case.

## II.

### STATEMENT OF FACTS

#### A. Jurisdiction and Venue

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and Section VIII.J of the Plan. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The venue of the Case is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief requested herein is section 502(c)(1) Bankruptcy Code.

#### B. General Case Background and Status

On February 4, 2013 (the "Petition Date"), the Debtor commenced the Case by filing a voluntary petition under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of California (the "Court"). On February 14, 2013, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Committee").

On September 23, 2013, the Court entered its *Order Confirming First Amended Liquidating Plan for San Diego Hospice & Palliative Care Corporation (June 24, 2013), as Modified on August 27, 2013 and September 18, 2013, Jointly Proposed by the Debtor and the Official Committee of Unsecured Creditors* [Docket No. 615] (the "Confirmation Order"), confirming the Plan. The Plan provides for the creation of the Liquidation Trust as successor in interest to the chapter 11 estate (the "Estate"), and the appointment of the Liquidating Trustee as its representative.

The Effective Date of the Plan was October 8, 2013 (the "Effective Date"). Pursuant to the Plan, on and after the Effective Date, the Liquidating Trust succeeded to the assets of the Estate and, *inter alia*, was charged with assessing, objecting to and compromising claims asserted in the Case, and continuing, instigating or responding to litigation and collecting assets.

Richard M Kipperman was selected to serve as the Liquidating Trustee of the Liquidating Trust. Since the Effective Date, the Liquidating Trustee has, *inter alia*, (1) resolved two adversary proceedings brought under the WARN Act and related statutes (commonly referred to in the Case,

1 and hereafter in this Motion, as “WARN I” and “WARN II”), (2) objected to numerous claims,  
2 thereby reducing general unsecured claims (other than that of the U.S. government) by more than  
3 half, and (3) liquidated and collected additional assets for ultimate distribution to general unsecured  
4 creditors (including the U.S. government).<sup>3</sup>

5 Because the WARN Act litigation included allegations of substantial administrative claims,  
6 the Liquidating Trustee was unable to make distributions to unsecured creditors until it was resolved.  
7 Now, only one other obstacle remains preventing the distribution of funds to unsecured creditors:  
8 Claim 237, which includes the Individual Ross Claim and the purported Class Claim (in an  
9 unspecified and unknown amount), both governed by terms of the Ross Stipulation.

10 **C. The Extended Employee Claims Bar Date**

11 On March 1, 2013, this Court entered an order [Docket No. 119] initially setting April 26,  
12 2013 (later extended to June 27, 2013 only as to newly scheduled creditors and former patients of the  
13 Debtor), as the deadline by which creditors were to file prepetition claims, other than claims filed by  
14 governmental units, rejection damage claims, claims related to the WARN Act and claims arising  
15 from the avoidance of transfers (the “Claims Bar Date”).

16 By *ex parte* motion, counsel to the WARN Claimants in WARN I (later counsel to the  
17 WARN Claimants in WARN II and current counsel to Ms. Ross), sought extension of the Claims  
18 Bar Date for the Debtor’s former employees, “until a reasonable time after the [WARN I]  
19 Certification Motion is adjudicated. *See Ex Parte Motion of Employees for Order Extending Bar*  
20 *Date for Filing Proofs of Claim; Declaration of Elaine V. Nguyen* filed April 5, 2013 [Docket  
21 No. 257] (the “Employee Bar Date Motion”) at p. 4, ll. 17-18. While the Employee Bar Date  
22 Motion sought an extension of the deadline to file claims for all employees for any reason,<sup>4</sup> the  
23 request for extension was inextricably tied to the uncertainty inherent in the WARN I class  
24 certification process. As the Employee Bar Date Motion argued, an extension would “insure that

25  
26 <sup>3</sup> Distributions to the U.S. government, on the one hand, and all other general unsecured creditors, on the other hand, are  
27 controlled by the Court’s order approving a settlement between the Liquidating Trust and the U.S. government entered  
August 1, 2014 [Docket No. 953].

28 <sup>4</sup> The Employee Bar Date Motion secondarily advanced other reasons (*e.g.*, the original Claims Bar Date had been set  
shortly after the Petition Date).

any Employee expecting their rights to be advanced through the Class won't be left without the ability to assert a claim in the unlikely event the Certification Motion is denied . . . [T]he request for extension is predicated on the resolution of certification.” *Id.* at ll. 20-22.

With certain conditions, neither the Debtor nor the Committee opposed the Employee Bar Date Motion. As negotiations regarding WARN I dragged on for many months, the bar date for employees was further extended numerous times by agreement of the parties. When WARN I was finally settled, the order approving the settlement [Docket No. 954] set a deadline for former employees of the Debtor who were not covered by the settlement to file claims of September 4, 2014--nineteen months following the Petition Date and fourteen months after the original Claims Bar Date (the “Employee Claims Deadline”).

Only two claims were filed in the thirty days between entry of the order approving the WARN I settlement and the extended Employee Claims Deadline, both during the final few hours of September 4, 2014: the so-called WARN II class claim and, at 7:59 p.m. PDT, Claim 237. Kandel Declaration, at ¶5.

**D. The Ross Emergency Motion, Draft Complaint and Ross Stipulation**

The Plan contains an injunction prohibiting all persons who have been, are, or may be holders of claims against the Debtor from, *inter alia*: “commencing, conducting or continuing in any manner, directly or indirectly any suit, action, or other proceeding of any kind against the Debtor . . .” Plan at VIII.B (the “Plan Injunction”).

On October 8, 2013, Ross filed her *Emergency Motion to (1) Modify the Automatic Stay* [sic] *to Liquidate Claim in State Court or District Court and (2) for Relief From Plan Injunction to Liquidate Claim in State Court or District Court* [Docket No. 648] (the “Emergency Motion”). A copy of the Emergency Motion is attached hereto as **Exhibit “2”**. The Emergency Motion sought relief from the automatic stay [sic] and Plan Injunction “so that [Ross] may proceed to adjudicate *her claim*” (Emergency Motion, p. 3, l. 23) and “so that [Ross] can proceed in state court on *her pending wrongful termination case*” (*id.*, p. 8) (emphases added). Attached as an exhibit to the Emergency Motion was Ross’ draft complaint (the “Draft Complaint”), which asserted two causes of action and which was not styled as a class action complaint. The Emergency Motion further noted that the

1 Draft Complaint was subject only “to further edits, and the right to assert California causes of  
2 action....” *Id.*, p. 3, ll. 18-19.

3 The Emergency Motion muddled the issue of whether Ross was looking only to insurance or  
4 whether Ross wanted the right to assert a claim against the Liquidating Trust in excess of insurance.  
5 Specifically, the Emergency Motion stated that Ross “will agree to limit her recovery to the limits of  
6 the Debtor’s insurance policy” and that her “primary source of recovery . . . will likely be the  
7 Insurance Policy.” Emergency Motion at p. 3, ll. 25-26, and p. 4, l. 18. While this appeared to leave  
8 the door open for Ross to assert a claim against the Estate, to be paid from assets of the Liquidating  
9 Trust, the Emergency Motion’s “Legal Analysis” argued that the Court should grant the motion  
10 because the Plan Injunction “is not intended to and does not protect third parties such as liability  
11 insurers”, *id.* at p. 4, l. 13, and that Ross’ \$1.3 million proof of claim “is well within the \$3.0 million  
12 limit of the Debtor’s policy.” Ross further suggested that she may nonetheless assert a claim against  
13 the Liquidating Trust “[i]f the claim is determined not to be covered under the policy for Debtor’s  
14 employment practices . . .” *Id.* at p. 6, ll. 14-15. Separately, Ross urged relief from the Plan  
15 Injunction because her “claim is within the policy limits of Movant’s asserted claim, and the Movant  
16 has agreed to be bound by the limits of the policy. *This will not prejudice the claims or interests of*  
17 *the other creditors in the case.*” *Id.* at p. 7, ll. 101-02 (emphasis added).

18 The Liquidating Trustee opposed the Emergency Motion [Docket Nos. 654 and 679], and the  
19 hearing on the Emergency Motion was continued pursuant to stipulation [Docket Nos. 656 and 664]  
20 in order to enable the Liquidating Trustee to review policies of insurance which may apply to the  
21 claims raised by Ross, and to engage in negotiations with both the insurer and Ross to determine  
22 whether the parties could reach a consensual resolution of the issues raised in the Emergency  
23 Motion.

24 After determining that in fact insurance did cover Ross’ claim and that no other party had  
25 asserted any claim against the \$3 million insurance policy for the year in question (*see* Kipperman  
26 Declaration, ¶ 4), the Liquidating Trustee entered into the Ross Stipulation, whereby Ross was  
27 relieved from the Plan Injunction “to commence litigation . . . as described in the Motion.” Ross  
28 Stipulation, at ¶1.

1 The Ross Stipulation carefully limited the claim that Ross could assert against the  
2 Liquidating Trust, if any: “Any claim by Ross against the above-captioned chapter 11 estate and the  
3 Liquidating Trust shall be limited to the amount of any judgement obtained in the Litigation (up to a  
4 maximum of \$2,950,000), less any amounts actually paid by the Insurer to Ross.” *Id.*, at ¶3.<sup>5</sup> On  
5 May 8, 2014, the Court entered an order approving the Ross Stipulation [Docket No. 860].

6 Beyond the carefully circumscribed relief in the Ross Stipulation, Ross expressly waived any  
7 and all other claims she might have against the chapter 11 estate and the Liquidating Trust and its  
8 assets. *Id.*

9 **E. The Class Action Complaint**

10 On May 16, 2014, Ross filed a seven-count class action complaint (the “Class Action  
11 Complaint”) in the Superior Court of the State of California for the County of San Diego, Case  
12 No. 37-2014-00016055-CU-WT-CTL (the “State Court Litigation”), seeking relief on behalf of Ross  
13 and “all others similarly situated”. Class Action Complaint, ¶22.

14 The Class Action Complaint, a copy of which is attached to Claim 237 (Exhibit “1” hereto),  
15 included claims that went radically beyond the scope of the claims in the Draft Complaint, the relief  
16 sought in the Emergency Motion, and the relief agreed to by the Liquidating Trustee in the Ross  
17 Stipulation, the latter of which had been carefully crafted to eliminate any liability of the Estate and  
18 the Liquidating Trust beyond that covered by insurance. Most notably, the Class Action Complaint  
19 included eleven paragraphs alleging “Class Allegations” which appear nowhere in the Draft  
20 Complaint attached to the Emergency Motion. *Id.*, ¶¶20-30.

21 On May 22, 2014, counsel for the Liquidating Trustee contacted counsel for Ross demanding  
22 dismissal of the Class Action Complaint or the filing of an amended complaint that complied with  
23 the limited relief granted in the Ross Stipulation and the order approving it. Kandel Declaration,  
24 attached hereto, ¶6. That demand was renewed on May 27, 2014. When Ross’ counsel refused, the  
25 Liquidating Trustee threatened to seek sanctions against Ross for her willful violation of the Plan

---

26 <sup>5</sup> The insurance policy in question included a self-insured retention of \$50,000; *i.e.*, the Liquidating Trustee would be  
27 liable for the first \$50,000 of attorneys’ fees and/or liability before the insurer’s obligation kicked-in. The Liquidating  
28 Trustee was so insistent on limiting potential cost to unsecured creditors that the Ross Stipulation requires Ross to  
reimburse the Liquidating Trust for half of the \$50,000 self-insured retention. Ross Stipulation, at ¶2; Kipperman  
Declaration, at ¶5.

Injunction by filing the Class Action Complaint asserting claims drastically beyond the relief granted to Ross by the Ross Stipulation. Ross finally conceded, agreeing to remove the class allegations from the State Court Litigation and to move forward with a class action only upon approval of this Court. *Id.*

**F. The Ross Proofs of Claim**

On August 30, 2013, Ross, in *pro per*, filed Claim 237-1 in the Case in the amount of \$1.3 million, alleging “civil rights violations during employment.” An identical claim, designated Claim 237-2, was filed on September 12, 2013, apparently in response to a notice of deficiency issued by the Clerk’s office. No class allegations appear in Ross’ Claims 237-1 or 237-2.

Almost a year later, at 7:59 p.m. on September 4, 2014, four hours and one minute prior to the expiration of the long-extended Employees Bar Date, Ross’ counsel filed Claim 237 as an amended proof of claim. Despite Ross’ waiver of any claim against the Estate or the Liquidating Trust by the Ross Stipulation other than that “limited to the amount of any judgment obtained in the Litigation (up to a maximum of \$2,950,000), less any amounts actually paid by the Insurer to Ross,” Claim 237 now at issue in this Motion purports to assert not only the Individual Ross Claim on behalf of Ross, but also the Class Claim on behalf of those “similarly situated”.<sup>6</sup>

**G. The Summary Judgement Order**

On January 29, 2016, counsel for the Liquidating Trustee filed a motion for summary judgment or partial summary judgment in the State Court Litigation, which Ross opposed. On June 1, 2016, the state court entered its *Order Granting in Part and Denying in Part Defendants’ Motion for Summary Judgment* [Doc. No. 64 in the State Court Litigation], a copy of which is attached hereto as **Exhibit “3”**.

The Summary Judgment Order denied the Liquidating Trustee’s motion to the extent it sought to dismiss allegations that the San Diego Foundation should be held liable as a “joint

---

<sup>6</sup> The filing of amended Claim 237 by Ross’ counsel to add the Class Claim allegations (and their earlier attempt to bypass the terms of the Ross Stipulation by filing a Class Action Complaint) would in fact appear to be completely contrary to Ross’ own interest. As an individual claimant/litigant, Ross will be able to collect any judgement she obtains from the Debtor’s insurer defending the individual action to a maximum of \$2,950,000. However, if the Court permits this to proceed as a class action, Ross’ ability to collect insurance could be severely diluted. This apparent anomaly is relevant in determining under Bankruptcy Rule 9014 whether to permit a class claim to go forward as a class action. *See* section IV. D.2, *infra*.



1 employer” with the Hospice if and to the extent Ross was awarded a judgment against the Hospice.  
2 Summary Judgment Order, at pp. 7-9. However, this ruling did not impact the Liquidating Trust,  
3 which never denied that the Hospice employed Ross. Moreover, this denial became moot when the  
4 state court granted summary judgment as to the entire substance of the State Court Litigation, ruling  
5 that Ross could not maintain claims for race discrimination, retaliation or harassment. *Id.*, at  
6 pp. 9-17. Among the detailed holdings was that Ross admitted “that she repeatedly violated the  
7 [Hospice’s] attendance policy”, which “prevents her from establishing she performed her job  
8 satisfactorily . . .” *Id.*, at p. 11.

9 **III.**

10 **RELIEF REQUESTED**

11 The Liquidating Trustee requests estimation of Claim 237 for distribution purposes in the  
12 amount of zero (\$0). With respect to the Individual Ross Claim, insurance coverage is available for  
13 almost the entirety of the Claim, and the only court to examine the substance of the claim has  
14 granted summary judgment with respect to it. With respect to the Class Claim allegations in  
15 Claim 237, they contravene the Ross Stipulation and Ross’ express waiver of any claims other than  
16 the individual, circumscribed, potential Individual Ross Claim. Further, virtually all of the factors  
17 considered by courts in determining whether to permit class claims to go forward under Bankruptcy  
18 Rule 9014 militate against even considering the question under Bankruptcy Rule 7023 of whether a  
19 class should be certified. In fact, the Class Claim allegations appear to be attorney-driven and to  
20 Ross’ detriment, and will cause further significant delay in the administration of this Case if  
21 permitted to ripen into a class action.

22 **IV.**

23 **ARGUMENT**

24 **A. Claim 237 is Contingent and Unliquidated**

25 The Bankruptcy Code authorizes the estimation of contingent and unliquidated claims for all  
26 purposes, which includes allowance and distribution. Section 502(c)(1) of the Bankruptcy Code  
27 provides: “There *shall* be estimated for purpose of allowance under this section – (1) any contingent  
28 or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the

administration of the case.” (emphasis added.) A claim is contingent when “the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor.” *In re Fostvedt*, 823 F.2d 305, 306 (9<sup>th</sup> Cir. 1987) citing *Brockenbrough v. Commissioner*, 61 B.R. 685, 686 (W.D. Va. 1986), quoting *In re All Media Properties, Inc.*, 5 B.R. 126, 132-3 (Bankr. S.D. Tex. 1980), *aff’d per curiam*, 646 F.2d 193 (5<sup>th</sup> Cir. 1981). A claim is unliquidated if it is not subject to “ready determination and precision in computation of the amount due.” *Fostvdt*, 823 F.2d at 306 (quoting *Sylvester v. Dow Jones & Company, Inc. (In re Sylvester)*, 19 B.R. 671, 673 (D.N.J. 1975)).

In the present case, Claim 237 is contingent upon: (1) Ross obtaining a judgement in the State Court Litigation in her favor, and (2) the Debtor’s insurance coverage being insufficient to pay any such judgment. Claim 237 is also unliquidated by its own terms; in the language of the proof of claim, the amount is “TBD”.

**B. The Failure to Estimate Highly Speculative Claim 237 Would Unduly Delay Administration of the Estate**

The Ninth Circuit has endorsed the estimation of claims where (as here) the claims are highly speculative and the resolution of the claims would unduly delay the administration of the bankruptcy case. “Given the highly speculative nature of appellants’ claims, the district court correctly found estimation to be appropriate.” *Ryan v. Louis (In re Corey)*, 892 F.2d 829, 834 (9<sup>th</sup> Cir. 1989).

Claim 237 is highly speculative. As stated above, in order for the Individual Ross Claim to be an allowed claim against the Liquidating Trust, Ross must not only obtain a judgement in the State Court Litigation, but the policy insuring against such loss must be insufficient to pay any such judgement. As explained below, this is a virtual impossibility—unless, ironically, Ross is permitted to go forward with a class action and assert the Class Claim, which could dilute her own ability to recover a judgment from the Debtor’s insurance.

Failure to estimate Claim 237 will also unduly delay the administration of this Case. Almost three years have passed since confirmation of the Plan and general unsecured creditors have yet to receive a distribution. This delay was largely because of the pendency of the WARN I and WARN II class action suits, well known by this Court and by counsel for Ross (who was also



counsel to the WARN Claimants). During this time, the Liquidating Trustee has completed the liquidation of the Debtor's assets, eliminated millions dollars of claims through objections and settlements, and brought significant further assets into the Liquidating Trust. Kipperman Declaration, ¶6.

The Liquidating Trustee is now, at long last, prepared to make a distribution to unsecured creditors, but Claim 237 expressly demands that he not do so until the Claim -- including its alleged Class Claim component -- is determined. Distributions and the administration of the Estate will therefore be further delayed, perhaps for additional years, unless Claim 237 is estimated and the Class Claim is not permitted to proceed. Kipperman Declaration, ¶8.

**C. The Court Should Estimate Claim 237 Utilizing the Procedure to Resolve Contested Matters**

The procedure to be utilized for estimation of a claim is within the sound discretion of the Court. "Neither the Code nor the Rules prescribe any method for estimating a claim, and it is therefore committed to the reasonable discretion of the court, *In re Hydrox Chemical Co.*, 194 B.R. 617, 623 (Bankr. N.D.Ill. 1996), which should employ whatever method is best suited to the circumstances of the case. *Id.*; *In re Thomson McKinnon Securities, Inc.*, 191 B.R. 976, 979 (Bankr. S.D.N.Y. 1996)." *In re Ralph Lauren Womenswear, Inc.*, 197 B.R. 771, 775 (Bankr. S.D.N.Y. 1996).

The Liquidating Trustee suggests that this Court can and should estimate Claim 237 at the hearing on the Motion. The Court has sufficient evidence provided in support of this Motion, and may further take judicial notice of its own files in this Case, to determine that: (1) should any amount be awarded to Ross in the pending State Court Litigation on the Individual Ross Claim, it will almost certainly be covered by insurance, and (2) the Court should not permit the Class Claim to proceed as a class action based a bankruptcy-centric analysis pursuant to Bankruptcy Rule 9014, even without reaching the class action considerations under Bankruptcy Rule 7023.<sup>7</sup>

---

<sup>7</sup> This Motion does not address the traditional, non-bankruptcy related analysis of whether to certify a class under Bankruptcy Rule 7023. The Liquidating Trustee does not believe that Ross can meet the threshold under Bankruptcy Rule 9014 before a "Rule 23" analysis should take place. If the Court determines that Ross has met such threshold, the Liquidating Trustee requests that the parties be given an opportunity to brief the issues under Rule 7023.

**D. The Court Should Estimate Claim 237 at Zero (\$0)**

**1. Claim 237 is Contrary to the Limited Relief in the Ross Stipulation.**

The Individual Ross Claim portion of Claim 237 should be valued at \$0. Pursuant to the Ross Stipulation, Ross can assert the Ross Individual Claim against the Liquidating Trust only to a maximum of \$2,950,000, less any amounts paid by insurance. The policy covering Ross' claim is in the current amount of approximately \$2,850,000, only slightly less than the absolute maximum Ross can assert under the Ross Stipulation. The Liquidating Trustee is aware of no other claims against the policy in question except, potentially, in the event Ross, contrary to the Ross Stipulation, is permitted to proceed with a class action against the Liquidating Trust. Finally, Ross' claim was originally filed in the amount of \$1.3 million, and Ross' counsel urged this Court to grant relief from stay in part because such amount was well within the policy covering the claim; only eleven months later did Ross' counsel amend her claim to reflect an undefined amount, without any basis therefor.

The Class Claim portion of Claim 237 should also be estimated at \$0 because this Court should determine that it will not permit the matter to go forward as a class action. First and foremost, the Class Claim allegations in Claim 237 are not encompassed within the limited claim reserved under the terms of the Ross Stipulation<sup>8</sup>; other than the Individual Ross Claim, Ross expressly waived any other claim in the Ross Stipulation.

The Ross Stipulation manifestly did not grant relief for Ross to file either the Class Claim or the Class Action Complaint. The Ross Stipulation only granted Ross relief from the automatic stay and the Plan Injunction "to commence litigation . . . as described in the [Emergency] Motion". Ross Stipulation at ¶1. The Draft Complaint attached to the Emergency Motion was not styled as a class action complaint. Beyond this circumscribed relief, *Ross waived any and all other claims she might have against the chapter 11 estate and the Liquidating Trust and its assets. Id.*, at ¶3. Filing the Class Action Complaint -- rather than an individual complaint subject to complete coverage by insurance -- is radically beyond the scope of the relief sought in the Emergency Motion and agreed

---

<sup>8</sup> Claim 237 itself conceded that "[a]fter the outcome of her litigation is determined", Ross was to "return to this Court pursuant to the [Ross] Stipulation" Claim 237, at p. 2. Indeed, as stated in Claim 237, Ross expressly agreed to "not seek class certification until such time as this issue [of whether the Ross Stipulation permits a class action to be brought] is resolved." *Id.*

1 to in the Ross Stipulation.

2 The limitation on the relief granted in the Ross Stipulation is evident on its face when read in  
3 conjunction with the limited relief sought in the Emergency Motion. Further, this limited relief had  
4 been carefully crafted to eliminate liability of the Estate and the Liquidating Trust beyond that  
5 covered by insurance. As described above and in the attached Kipperman and Kandel Declarations,  
6 the Liquidating Trustee, with Ross' full knowledge, structured the Ross Stipulation such that, should  
7 Ross be successful in the State Court Litigation, the insurance proceeds would likely be sufficient to  
8 pay all of any such judgement in full. Kipperman Declaration at ¶3; Kandel Declaration at ¶4.

9 Specifically, the Liquidating Trustee assessed that no other employees had made any claims  
10 similar to those of Ross for racial discrimination, and for the year in question no other claims of any  
11 other kind subject to coverage under the \$3 million policy had been made. Kipperman Declaration  
12 at ¶5. This is also supported by the terms of the Ross Stipulation, which permitted Ross to only  
13 assert a claim against the Liquidating Trust to a maximum of \$2,950,000, less amounts paid by  
14 insurance. In fact, the Ross Stipulation seeks to protect the Estate and Liquidating Trust from a  
15 potential claim to such an extent, that although the policy is in the nominal amount of \$3 million, the  
16 limitation was instead set at \$2,950,000. Kipperman Declaration at ¶6; Kandel Declaration at ¶4.<sup>9</sup>

17 Indeed, Ross urged the Court to grant relief from stay in large part because insurance would  
18 very likely be more than sufficient to pay any claim she was awarded. As argued by Ross in the  
19 Emergency Motion, "[b]ased upon the sum set forth in the Movant's proof of claim [\$1.3 million],  
20 that claim is well within the \$3.0 Million limit of the Debtor's policy. Relief from stay will result in  
21 the liquidation of Movant's claim and payment from insurance proceeds." Emergency Motion, at p.  
22 6. Only eleven months later did Ross's attorneys amend her claim to eliminate the \$1.3 million  
23 claim amount.

24 **2. The State Court Found that Ross Could Not Prove That She Performed Her Job**  
25 **Satisfactorily.**

26 Granting summary judgment with respect to Ross' claims, the state court found that Ross  
27

28 <sup>9</sup> The current balance of such policy is approximately \$2,850,000 following the granting of summary judgment in favor  
of the Liquidating Trustee. Kipperman Declaration at ¶7.

1 admitted “that she repeatedly violated the [Hospice’s] attendance policy”, which “prevents her from  
2 establishing she performed her job satisfactorily and a prima facie case of discrimination.” Thus,  
3 even to the extent the policy theoretically may be insufficient to pay the entirety of the Individual  
4 Ross Claim, the only court examining the substance of the Individual Ross Claim has found  
5 summary judgment in favor of the Liquidating Trustee warranted in a detailed, seventeen page order.

6 **3. Claim 237 Should Not Proceed as a Class Claim Pursuant to Bankruptcy Rule**  
7 **9014.**

8 Independent of the fact that permitting Ross to assert the Class Claim and proceed with a  
9 class action is prohibited by the Ross Stipulation, this Court should not permit a new class action to  
10 proceed because it is manifestly inappropriate to do so in these circumstances. Class claims are not  
11 permitted in all Circuits. *See* 1 McLaughlin on Class Actions § 2:10 (12th ed. 2015) (“Courts are  
12 divided, however, on whether a representative claimant may file a proof of claim on behalf of a class  
13 of similarly situated creditors or whether each claimant must file its own proof of claim”). The  
14 Ninth Circuit, though, following the majority rule, does recognize and allow class claims subject to  
15 Bankruptcy Rule 9014(c). *See In re Birthing Fisheries, Inc.*, 92 F.3d 939, 939 (9th Cir. 1996).  
16 “However, Bankruptcy Courts have broad discretion to allow or disallow such class claims.”  
17 *Westfall v. MII Liquidation Inc.*, 2007 WL 2700951, at \*4 (S.D. Cal. Sept. 11, 2007).

18 “[A]bsent a successful motion under Rule 9014 requesting class representative status  
19 under Rule 7023, Rule 23 cannot be invoked in bankruptcy proceedings.” *In re Dynege, Inc.*,  
20 770 F.3d 1064, 1068-69 (2d Cir. 2014). Some cases and commentators have stated that, in  
21 making such a determination under Rule 9014, “bankruptcy significantly changes the balance of  
22 factors to be considered in determining whether to allow a class action, and that class  
23 certification may be ‘less desirable in bankruptcy than in ordinary civil litigation’. Litigating  
24 Mass Tort Cases § 12:18.50; (updated June 2015), David J. Molton and Paul D. Rheingold, Mass  
25 Tort Issues in Bankruptcy Proceedings, quoting *Matter of American Reserve Corp.*, 840 F.2d  
26 487, 493 (7th Cir. 1988).

27 Courts consider a variety of factors in determining whether to permit a class claim to go  
28 forward as a class action in a bankruptcy case, virtually all of which strongly militate against

1 permitting the Class Claim to proceed as a class action, and which would significantly delay  
2 distributions to unsecured creditors and the administration of this Estate.

3 In exercising discretion under Bankruptcy Rule 9014 whether to even proceed to the next  
4 step—assessing class certification under the traditional class action considerations pursuant to  
5 Bankruptcy Rule 7023—“a pervasive theme is avoiding undue delay in the administration of the  
6 case.” *In re Ephedra Products Liab. Litig.*, 329 B.R. 1, 5 (S.D.N.Y. 2005). In *Ephedra*, the Court  
7 determined that a class action was inappropriate because “granting of class action claims at this late  
8 juncture would wholly disrupt and undercut the expeditious execution of the Plan of  
9 Reorganization.” *Ephedra*, 329 B.R. at 4. As the court explained at greater length:

10 [T]he potential interference with timely distribution in itself presents sufficient  
11 grounds to expunge the class claims. The liquidating plan was already  
12 submitted for a vote of creditors before the Court was finally asked to decide  
13 whether or not to exercise its discretion under Rule 9014. Applying Rule 23 to  
the class claims now would initiate protracted litigation that might delay  
distribution of the estate for years.

14 *Id.*, 329 B.R. at 5. *See also, e.g., In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 376, 377  
15 (Bankr. S.D.N.Y. 1997).

16 Primarily due to the time it took to resolve and get class approval of the settlement of  
17 WARN I, followed by the filing and lengthy process of resolving WARN II, unsecured creditors  
18 have waited three years since confirmation of the Plan to receive a distribution. During this time, the  
19 Liquidating Trustee has proceeded through the claims objection process, significantly reducing  
20 claims through objections and settlements, and has marshalled and liquidated significant assets for  
21 distribution. Also during this time, Ross has pursued the State Court Litigation and her Individual  
22 Ross Claim as permitted (and as circumscribed) by the Ross Stipulation. If the Class Claim  
23 allegations in Claim 237 are permitted to go forward as a class action suit, meaningful distributions  
24 to unsecured creditors could be delayed for years more.

25 The application of other factors discussed by courts also militate towards refusal to permit  
26 the Class Claim in Claim 237 to proceed as a class action:

27 1. Whether a class was certified prepetition (see, e.g., *In re Craft*, 321 B.R. 189, 198  
28 (Bankr. N.D. Tex. 2005); see cases at *In re Musicland Holding Corp.*, 362 B.R. 644, 654 (Bankr.

1 S.D.N.Y. 2007): Of course, not only was no class certified prepetition, but we stand three years  
2 post-confirmation and Ross has not sought relief from the plan injunction (or, earlier, relief from  
3 stay) to bring a class action. Further, the Class Claim aspect of Claim 237 was asserted mere hours  
4 before the expiration of a bar date, which had already been extended for fourteen months longer than  
5 the bar date for all other creditors.

6 2. Whether certification will deter further bad acts by management (“[T]he class claim  
7 will not deter an insolvent, non-operating debtor's management or shareholders, or induce them to  
8 police future conduct.” *In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 376 (Bankr.  
9 S.D.N.Y. 1997) (citation omitted)): Here, the Debtor, of course, is no longer in operation, so there is  
10 no management to deter.

11 3. Whether the proposed class action appears to be a “lawyer’s vehicle.” (*Woodward*,  
12 205 B.R. at 376-77): Ross filed her original proof of claim in the Case on August 30, 2013, only  
13 asserting the Individual Ross Claim now at issue and without any class allegations. The filing by  
14 Ross’ counsel of the amended Claim 237 that included the Class Claim more than a year later, and  
15 four hours prior to the Employee Claims Deadline (and the earlier attempt to bypass the terms of the  
16 Ross Stipulation by filing a Class Action Complaint), appear to be completely contrary to Ross’ own  
17 best interest. As an individual claimant, Ross, and Ross alone, will be able to collect any judgment  
18 she obtains on the Individual Ross Claim to a maximum of \$2,850,000 from the Debtor’s insurer.  
19 However, if the Court permits Claim 237 to proceed as a class action, Ross’ ability to collect  
20 insurance on her Individual Ross Claim could be severely diluted. Further evidence that the Class  
21 Claim and concomitant proposed class action is merely a “lawyer’s vehicle” is that (a) Ross initially  
22 filed her claim in *pro per* and it did not include class allegations, (b) Ross herself has been and  
23 continues to be adequately represented in the state court, as one would expect in connection with the  
24 Individual Ross Claim, which alleged \$1.3 million in individual damages even before Ross’ counsel  
25 modified it, (c) the inclusion of the Class Claim allegations by counsel appears to be to Ross’ severe  
26 potential detriment, and (d) no other former employee filed a similar claim in the fourteen months of  
27 extended time for employees to file claims.

28 Whether bringing the class action is “employed in [an] attempt[] to engage in some kind of



1 ‘gotcha’ behavior designed to gain an unfair advantage.” (*Gentry v. Siegel*, 668 F.3d 83, 92 (4th Cir.  
2 2012): As discussed above, Ross filed the Emergency Motion seeking relief to sue the  
3 Debtor/Liquidating Trust in the state court in connection with the Individual Ross Claim allegations.  
4 The Draft Complaint, while subject to “edits,” included no hint of any Class Claim allegations. The  
5 Liquidating Trustee and Ross engaged in lengthy negotiations in an effort to consensually resolve  
6 the Emergency Motion. In those negotiations the Liquidating Trustee, through counsel, stressed the  
7 Trustee’s willingness to stipulate only if the Liquidating Trustee could be reasonably assured that  
8 Ross’ recovery, if any, would be covered by insurance. As a result, the Ross Stipulation permits  
9 Ross to proceed in the State Court Litigation on the Individual Ross Claim, and permits her to assert  
10 a residual claim against the Liquidating Trust only to the extent the Liquidating Trustee’s assessment  
11 of available insurance proceeds is incorrect (*i.e.*, up to \$2,950,000 less amounts recovered by Ross  
12 from insurance). Ross explicitly waived “any other claim of any nature” against the Estate and the  
13 Liquidating Trust and its assets. Ross Stipulation, ¶3.

14 In violation of the terms of the Ross Stipulation, (a) Ross filed the Class Action Complaint,  
15 only agreeing to remove the class allegations (subject to this Court later permitting her to bring such  
16 an action) after repeated threats by the Liquidating Trustee to bring a contempt motion for Ross’  
17 willful violation of the Plan Injunction, and (b) filed the Class Claim as part of Claim 237, despite  
18 waiving all claims “of any nature” not specifically allowed to her in the Ross Stipulation. In sum,  
19 the Class Claim allegations in Claim 237, amended for this specific purpose four hours prior to the  
20 expiration of the Employees’ Claims Bar Date (previously extended for fourteen months to allow  
21 employees to file or supplement claims in the event a class was not certified in WARN I), and which  
22 were not permitted under the Ross Stipulation, represent “gotcha” behavior and appear to be  
23 “designed to gain an unfair advantage.”

V.

**CONCLUSION**

For all the foregoing reasons, the Liquidating Trustee respectfully requests that the Court enter an order (i) granting the Motion, (ii) estimating Claim 237 for all purposes including distribution in the amount of zero dollars (\$0), and (iii) granting such other and further relief as is fair and equitable.

Dated: October 21, 2016

PACHULSKI STANG ZIEHL & JONES LLP

By /s/ Jeffrey L. Kandel  
Jeffrey L. Kandel  
Attorneys for Richard M Kipperman,  
Liquidating Trustee of the Liquidating  
Trust of San Diego Hospice & Palliative  
Care Corporation

PACHULSKI STANG ZIEHL & JONES LLP  
ATTORNEYS AT LAW  
LOS ANGELES, CALIFORNIA



**DECLARATION OF RICHARD M KIPPERMAN**

I, Richard M Kipperman, declare as follows:

1. I am over 18 years of age. I am the Liquidating Trustee of the Liquidating Trust established in the above-captioned chapter 11 case. I have personal knowledge of each of the facts stated in this declaration, except for those facts stated on information and belief, and as to those facts, I am informed and believe them to be true. Some of the information presented below is based upon my review of documents and files maintained in the ordinary course of business by San Diego Hospice & Palliative Care Corporation. If called as a witness, I could and would testify as to the truth of the matters set forth herein based upon my personal knowledge, except where otherwise indicated below.

2. I submit this declaration in support of the *Liquidating Trustee's Motion For Order Estimating Class Claim Of Leilani Ross For Purposes Of Allowance And Distribution* (collectively, the "Motion"). Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion or in the memorandum of points and authorities submitted in support of the Motion attached thereto.

3. The Ross Stipulation was structured such that, should Ross be successful in the State Court Litigation, the insurance proceeds would likely be sufficient to pay any such judgement in full.

4. After determining that insurance did cover Ross' claim and that no other party had asserted any claim against the \$3 million insurance policy for the year in question, I agreed to enter into the Ross Stipulation.

5. Specifically, I assessed that no other employees had made any claims similar to those of Ross for racial discrimination, and for the year in question, no other claims of any other kind subject to coverage under the \$3 million policy had been made.

6. I was so insistent on limiting potential cost to unsecured creditors that the Ross Stipulation requires Ross to reimburse the Liquidating Trust for half of the \$50,000 self-insured retention, and the limitation on Ross' claim was set at \$2,950,000, below the policy amount.

7. I am informed and believe that, following the granting of summary judgment in my favor in the State Court Litigation, the current balance of such policy is approximately \$2,850,000.

1           8. Three years have passed since confirmation of the Plan and general unsecured  
2 creditors have yet to receive a distribution. This delay was largely because of the pendency of the  
3 WARN I and WARN II class action suits. During this time, I have completed the liquidation of the  
4 Debtor's assets, eliminated millions dollars of claims through objections and settlements, and  
5 brought significant further assets into the Liquidating Trust.

6           9. I am now prepared to make a distribution to unsecured creditors, but Claim 237  
7 expressly demands that he not do so until the claim -- including its alleged Class Claim component --  
8 is determined. Distributions and the administration of the Estate will therefore be further delayed,  
9 perhaps for additional years, unless Claim 237 is estimated and the Class Claim is not permitted to  
10 proceed.

11           I declare under penalty of perjury under the laws of the United States of America that the  
12 foregoing is true and correct.

13           Executed this 30<sup>th</sup> day of September, 2016, in LA Mesa, California.

14  
15   
16 Richard M Kipperman

PACHULSKI STANG ZIEHL & JONES LLP  
ATTORNEYS AT LAW  
LOS ANGELES, CALIFORNIA

**DECLARATION OF JEFFREY L. KANDEL**

I, Jeffrey L. Kandel, declare and state as follows:

1. I am an attorney at law duly licensed to practice in the State of California. I am of counsel to the law firm of Pachulski Stang Ziehl & Jones LLP, counsel to Richard M Kipperman, the Liquidating Trustee of the Liquidating Trust of San Diego Hospice & Palliative Care Corporation, the former debtor in possession in the above-captioned chapter 11 case. I have personal knowledge of the facts set forth herein and if called as a witness I could and would competently testify thereto.

2. All facts contained within this Declaration are based upon my personal knowledge. If called upon as witness, I could and would competently testify as to all of the matters stated herein.

3. I make this Declaration in support of *Liquidating Trustee's Motion For Order Estimating Class Claim Of Leilani Ross For Purposes Of Allowance And Distribution* (the "Motion").

4. The Ross Stipulation was structured such that, should Ross be successful in the State Court Litigation, the insurance proceeds would likely be sufficient to pay any such judgement in full. This goal was an integral part of the negotiations with, and was made clear to, Ross' counsel. Among other things, this is the reason, made clear to Ross' counsel, that the Stipulation requires Ross to reimburse the Liquidating Trust for half of the \$50,000 self-insured retention and the limitation on Ross' claim was set at \$2,950,000, below the policy amount.

5. Only two claims were filed in the thirty days between entry of the order approving the WARN I settlement and the extended Employee Claims Deadline, both during the final few hours of September 4, 2014: the so-called WARN II class claim, and Claim 237--at 7:59 p.m. PDT.

6. On May 22, 2014, I contacted counsel for Ross demanding dismissal of the Class Action Complaint or the filing of an amended complaint that complied with the limited relief granted in the Ross Stipulation and the order approving it. That demand was renewed on May 27, 2014. When Ross' counsel refused, I, on behalf of the Liquidating Trustee, threatened to seek sanctions against Ross for her willful violation of the Plan Injunction by filing the Class Action Complaint asserting claims drastically beyond the relief granted to Ross by the Ross Stipulation. Ross finally conceded, agreeing to remove the class allegations from the State Court Litigation and to move

1 forward with a class action only upon approval of this Court.

2 I declare under penalty of perjury under the laws of the State of California and the United  
3 States of America that the foregoing is true and correct.

4 Executed this 21<sup>st</sup> day of October, 2016, in Los Angeles, California.

5  
6 /s/ Jeffrey L. Kandel

7 Jeffrey L. Kandel  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT 1

*Penalty for presenting fraudulent claim:* Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

## ATTACHMENT TO PROOF OF CLAIM

III.

Dispute Between Ross And The Trustee Regarding The Extent Of Relief Ross Seeks In State Court

Ross obtained an order granting relief from the plan injunction based on a stipulation she entered into with the Trustee. See attached Complaint. The Stipulation nor Order on the Stipulation, limited the claims Ross could file in the State Action. In her motion for relief from the plan injunction, Ross believed she would need to amend her Complaint and reserved this right, disclosing that the Complaint was only a draft. The motion was filed on an emergency basis. This reservation was incorporated into the order on the stipulation, as the order indicates she could commence litigation as described in the Motion (which incorporated the right to make amendments).

The Trustee now objects to certain of the amendments to Ross' Complaint in State Court. Ross has asserted derivative class action claims, but has not sought to move for certification, which is the process whereby the derivative claims are certified for group prosecution. Elaine Mayol, another former employee obtained relief from the Plan injunction so she could pursue her class action derivative claims, yet nowhere does the Mayol order nor stipulation deny Mayol the right to bring derivative class allegations, nor does it give relief from the Plan injunction to unknown class members. That stipulation is identical to Ross' stipulation, yet upon information and belief, the same demands are not being made upon Mayol to dismiss her class allegations.

Rather than seeking clarification on the Stipulation and order, the Trustee has needlessly threatened sanctions when there is no motion to certify a class. Ross has permitted state counsel for the Liquidating Trustee additional time to respond to the Complaint, and will not seek class certification until such time as this issue is resolved via clarification or the parties have agreed to a proper discourse. State Counsel has also stated to Ross' counsel there is some development in the case, but has not indicated what that development is. Ross does not oppose extending the deadline to respond to the Complaint until such time as any clarification is determined or the parties agree otherwise.

Ross is also considering the possibility of litigating the severable individual claims in State Court and bringing the class claims pursuant to Fed. R. Bank. 7023 via this claim.

After meeting and conferring, Ross hopes her litigation can proceed. After the outcome of her litigation is determined, Ross will return to this Court pursuant to the Stipulation.



IV.

Reservation Of Rights

1. Ross demands all sums that come due post-petition to her, and that continue to accrue, pursuant to the Bankruptcy Code and state law.

2. In executing and submitting this Proof of Claim, Ross is not waiving any claim, action, or cause of action she may have against the Debtor, the Trust or any other person, including the right to assert different amounts from the amounts set forth herein, nor is Ross waiving any defense, offset, recoupment, counter-claim, cross-claim, right to injunctive relief, right to a receiver, or such a similar right or remedy Ross may now have, or at any time have against the Debtor, Trust or any other entity or person or with respect to any legal or equitable proceeding now existing or hereafter commenced.

3. Ross reserves the right to amend or supplement this Proof of Claim in any respect thereto, but not limited to, the assertion, by proof of claim or other application to this Bankruptcy Court, for any amount that becomes due under any Policy by and among the Debtor, pursuant to Court order or otherwise, and continuing costs, fees, and expenses (including legal fees and disbursements) arising in relation to the claims asserted herein or any of the agreements and the assertion of an administrative expense priority and adequate protection for any such claim or claims.

4. In submitting this Proof of Claim, Ross does not submit to the Bankruptcy Court's jurisdiction for resolving all matters related to the Proof of Claim, but reserves all rights accordingly. Without limiting the foregoing, Ross, specifically reserves her right to: (a) have final orders in non-core matters entered only after *de novo* review by the State Court; (b) have a trial by jury on any matter so triable in the Debtor's case, or in any case, controversy, or proceeding related to Debtor's case; or (d) obtain an adjudication of rights in any applicable forum to which she may be entitled, of any other rights, claims, actions, defenses, set-offs, or recoupment

V.

Distributions And Notices

Any distribution on account of this Proof of Claim should be directed as follows:

Gail J. Higgins (CA Bar No. 164989)  
*ghigginse@aol.com*  
**Higgins Law Firm**  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
Telephone: 310.409.7080  
Facsimile: 310.388.1018

All notices with respect to this Proof of Claim should be sent to:

Gail J. Higgins (CA Bar No. 164989)  
*ghigginse@aol.com*  
**Higgins Law Firm**  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
Telephone: 310.409.7080  
Facsimile: 310.388.1018

VI.

Objection To Distributions

No distributions should be made to any general unsecured creditors until such time as Ross's claim is determined by the court hearing her lawsuit. Ross therefore, objects to any distribution to any unsecured creditors until a determination has been made regarding her claims.

1 Gail J. Higgins (CA Bar No. 164989)  
ghigginse@aol.com

2 **Higgins Law Firm**  
1017 N. La Cienega Blvd. Ste. 103  
3 West Hollywood, California 90069  
Telephone: 310.409.7080  
4 Facsimile: 310.388.1018

5 Counsel To Plaintiff  
Leilani Ross, Individually And On Behalf  
6 Of All Others Situated

**F I L E D**  
Clerk of the Superior Court

**MAY 16 2014**

7  
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF SAN DIEGO**

10  
11 In re

12 LEILANI ROSS, individually and on behalf  
13 of all others similarly situated,

14 Plaintiffs,

15 v.

16 SAN DIEGO HOSPICE & PALLIATIVE  
17 CARE CORPORATION, a California  
Corporation, SAN DIEGO HOSPICE  
18 FOUNDATION, a California Corporation,  
RICHARD M. KIPPERMAN, solely in his  
19 capacity as liquidating trustee of the  
Liquidating Trust of San Diego Hospice &  
20 Palliative Care, and DOES 1-10,

21 Defendants.

MAY 16 '14 4:08  
Case No.: 37-2014-00016055-CU-WT-CTL

**PLAINTIFF LEILANI ROSS'S CLASS  
ACTION COMPLAINT FOR DAMAGES  
BASED ON:**

(1) TITLE VII OF THE CIVIL RIGHTS ACT  
(2) 42 U.S.C. SECTION 1981  
(3) DISCRIMINATION ON THE BASIS OF  
RACE, ANCESTRY, NATIONAL ORIGIN,  
IN VIOLATION OF FEHA  
(4) DISCRIMINATION ON THE BASIS OF  
RACE, ANCESTRY, NATIONAL ORIGIN,  
IN VIOLATION OF FEHA  
(5) RETALIATION FOR COMPLAINING  
OF DISCRIMINATION ON THE BASIS  
OF RACE IN VIOLATION OF FEHA  
(6) FAILURE TO PREVENT  
DISCRIMINATION AND HARASSMENT  
IN VIOLATION OF THE FEHA  
(7) WRONGFUL TERMINATION IN  
VIOLATION OF PUBLIC POLICY

**JURY TRIAL DEMANDED**

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

Original

BY FAX

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd., Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

1 Plaintiff Leilani Ross ("**Ross**" or "**Plaintiff**"), by and through counsel, hereby files  
2 the following Class Action Complaint and Jury Demand ("**Complaint**").

3 **PRELIMINARY STATEMENT**

4 1. This is an action for an award of damages, punitive damages, attorneys'  
5 fees and other relief on behalf of former employee Plaintiff Leilani Ross against San  
6 Diego Hospice & Palliative Care, Corporation ("**SDHP**") and other defendants  
7 (collectively, the "**Defendants**"). Plaintiff Ross has been harmed by the Defendant's race  
8 discrimination and harassment, and Defendant's retaliation and wrongful termination of  
9 her based on her complaints about race and harassment. This action arises under Title  
10 VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C.  
11 § 2000(e), et seq. ("**Title VII**"), the Civil Rights Act of 1866, as amended, 42 U.S.C. §  
12 1981 ("**Section 1981**"), and the California Fair Employment and Housing Act et seq.  
13 ("**FEHA**"). Ross, on behalf of herself and all others similarly situated, also seeks class  
14 certification of her 1981 and the DFEH claim for failure to prevent discrimination, on the  
15 basis that SDHP utilized policies to deny African Americans and other minorities their  
16 shifts, opportunities, and promotions, based on the preference of patients for non-minority  
17 caregivers. This is reprehensible practice that the EEOC found to exist, and such should  
18 not prevail in the San Diego community in any other facilities, hospitals, or any other  
19 business.

20 **JURISDICTIONAL STATEMENT**

21 2. This Court has personal jurisdiction over the defendants as they regularly  
22 transact business in this judicial district.

23 3. Venue is proper in this judicial district because a substantial part of the events  
24 giving rise to the causes of action occurred in this district.

25 4. As for the federal causes of action asserted in the Complaint, the State Court  
26 has authority to hear the claims. *Robb v. Connolly*, 111 U.S. 624 (1884); *Clafin v.*  
27 *Houseman*, 93 U.S. 130, 136 (1876); *Yellow Freight System, Inc. v. Donnelly*, 490 U.S. 820,  
28 822 (1990) (State Court has concurrent jurisdiction to hear Title VII Claims); *DeHorney v.*

1 *Bank of America National Trust & Savings Association*, 879 F.2d 459, 463 (9<sup>th</sup> Cir. 1989)  
2 (State Court has concurrent jurisdiction to hear Section 1981 claims).

3 5. All conditions precedent to the institution of this suit have been fulfilled. On  
4 July 2, 2013, the United States Equal Employment Opportunity Commission ("EEOC")  
5 issued Notice of the Right to Sue ("Notice") to Plaintiff. Plaintiff received the Notice on  
6 July 16, 2013. Plaintiff and Kipperman (as defined below) agreed to toll the statute of  
7 limitations under the Notice. Plaintiff and Kipperman entered subsequent agreement to  
8 toll the statute of limitations approved by the Bankruptcy Court. Thus, this action has  
9 been filed timely.

#### 10 PARTIES AND PROCEDURAL BACKGROUND

11 6. Plaintiff Leilani Ross is a forty-one (41) year-old African-American female  
12 who resides in San Diego County.

13 7. Defendant SDHP was, and is, a corporation duly organized and existing  
14 under state law that acted as Plaintiff's employer that does significant business within  
15 the Commonwealth of California and is engaged in an industry affecting commerce.  
16 SDHP formerly provided patient and family care services. Defendant Foundation  
17 ("Foundation") was, and is, a corporation duly organized and existing under California  
18 state law, and is liable for the allegations herein because Foundation was a joint  
19 employer with SDHP, operated an integrated enterprise with SDHP, there was an  
20 interrelation of operations between Foundation and SDHP, there was centralized control  
21 of labor relations between Foundation and SDHP, there was common management with  
22 SDHP and the Foundation, there was common ownership and financial control between  
23 SDHP and the Foundation. As for the California claims, Plaintiff also asserts the  
24 Foundation and SDHP were alter egos, and alleges this for the purpose of this  
25 Complaint.  
26  
27  
28

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd, Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

1 8. SDHP has a location at 4311 Third Avenue, San Diego, CA 92103, ("**San**  
2 **Diego Facility**") where Plaintiff Ross was employed. The Foundation has the same  
3 location.

4 9. At all times material hereto, Defendant SDHP employed more than five  
5 hundred individuals.

6 10. At all times material hereto, Defendant SDHP acted by and through its  
7 authorized agents, servants, workmen and/or employees acting within the course and  
8 scope of their employment with Defendant and in furtherance of Defendant's business.

9 11. At all times relevant hereto, Defendant SDHP acted as a "person" and  
10 "employer" within the meaning of one or more of the anti-discrimination laws at issue in  
11 this suit and is accordingly subject to the provisions of said laws. At all times relevant  
12 hereto, the San Diego Hospice Foundation, Corporation (the "**Foundation**") is liable for  
13 the allegations herein because Foundation was a joint employer with SDHP, operated an  
14 integrated enterprise with SDHP, there was an interrelation of operations between  
15 Foundation and SDHP, there was centralized control of labor relations between  
16 Foundation and SDHP, there was common management with SDHP and the Foundation,  
17 there was common ownership and financial control between SDHP and the Foundation.  
18 As for the California claims, Plaintiff also asserts the Foundation and SDHP were alter  
19 egos, and alleges this for the purpose of this Complaint.

20 12. At all times relevant hereto, Plaintiff Leilani Ross was an "employee" of  
21 SDHP within the meaning of the anti-discrimination laws at issue in this suit and is  
22 accordingly entitled to the protections of said laws.

23 13. On February 4, 2013, SDHP filed a voluntary petition under chapter 11 of  
24 Title 11, United States Code, commencing a bankruptcy case.

25 14. On September 12, 2013, Plaintiff filed a proof of claim with the United  
26 States Bankruptcy Court. Plaintiff will be filing an amended proof of claim. Plaintiff had  
27 contacted attorneys representing the interests of the Committee of Unsecured Creditors  
28 ("**Committee**"), who became attorneys for the liquidating trust regarding her claim.

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

1 15. Ross contacted the Bankruptcy Court, SDHP's attorneys, and the  
2 Committee's attorney to discuss the procedural posture of her claim. For many months,  
3 Ross was in *pro se*. For a significant time, Debtor nor Committee's counsel responded to  
4 Ross, despite her attempts to resolve the procedural posture of her claim. When she  
5 finally did get in contact with Mr. Maizel, Committee Counsel, she was told to assert her  
6 claims against the estate and that based on the language of the confirmation order and  
7 Plan, her sole remedy would be in the Bankruptcy Court, even though this was not a true  
8 statement. She also subsequently asked Mr. Maizel, counsel to the Committee, to  
9 stipulate to relief from stay, but he would not agree to do so unless she had counsel. In  
10 addition, Ross believes any deadline would be deemed contractually tolled based on a  
11 stipulation extending bar date for all former employees. Adv. Case No. 13-90082-MM11,  
12 docket entry no. 5. This Order provides "[t]he deadline by which any former or current  
13 employee of the Debtor may file a proof of claim ("Bar Date") is extended to 30 days  
14 after the date the court actually issues its written ruling on the Certification Motion, Adv  
15 Dock. Entry No. 5,."

16 16. On September 23, 2013 (the "Confirmation Date"), the Court entered its  
17 Order confirming the *First Amended Liquidating Plan for San Diego Hospice and*  
18 *Palliative Corporation (June 24, 2013), as Modified on August 27, 2013 and September*  
19 *18, 2013 Jointly Proposed by the Debtor and the Official Committee of Unsecured*  
20 *Creditors* (the "Plan") [Bank. 615]. The Effective Date of the Plan was October 8, 2013.  
21 Pursuant to the Plan, on or after the Effective Date, the Liquidating Trust succeeded to  
22 the assets of the Debtor and, *inter alia*, was charged with assessing, objecting to and  
23 compromising claims asserted in the Case. Richard M Kipperman ("**Kipperman**") was  
24 selected by the Committee and SDHP to serve as the Liquidating Trustee of the  
25 Liquidating Trust. Kipperman is named in this Complaint nominally, and solely in his  
26 capacity as trustee of the successor vehicle to SDHP.

27 17. On October 8, 2013, Ross filed her *Emergency Motion to (1) Modify the*  
28 *Automatic Stay to Liquidate Claim in State Court or District Court and (2) for Relief From*

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080- FAX 310.388.1018

1 *Plan Injunction to Liquidate Claim in State Court or District Court* [Bank. Docket No. 648]  
2 (the "Emergency Motion"). Thereafter, (1) on October 9, 2013, the Liquidating Trustee  
3 filed an opposition thereto [Bank. Docket No.654]; (2) on November 6, 2013, the  
4 Liquidating Trustee filed a supplemental opposition thereto [Bank. Docket No. 679]; and  
5 (3) on November 14, 2013, Ross filed a reply to the Liquidating Trustee's opposition and  
6 supplemental opposition [Bank. Docket No.692].

7 18. The hearing with respect to the Emergency Motion was originally scheduled  
8 for October 10, 2013, and was continued pursuant to stipulation of the Parties [Bank.  
9 Docket No. 656] and order of this Court [Bank. Docket No. 664] in order to enable the  
10 Liquidating Trustee to review any policies of insurance which may apply to the claims  
11 raised by Ross and, based thereon, to engage in negotiations with both the insurer and  
12 Ross to determine whether the Parties can reach a consensual resolution of the issues  
13 raised in the Motion. Pursuant to various stipulations continuing the matter, the parties  
14 agreed to toll all claims Ross had. Ross did this out of abundance of caution, even  
15 though based on the stipulation, it appeared the statute of limitations was already being  
16 tolled.

17 19. The Motion was resolved with a new agreement and stipulation for tolling,  
18 approved by the Bankruptcy Court on May 8, 2014, [Bank. Docket No. 860]. The Order  
19 granted Ross relief from stay and embodied a new agreement to toll the statute of  
20 limitations through May 19, 2014 with no limitations as to any allegation of SDHP of  
21 infirmity, that had been reserved by SDHP in previous stipulations.

22 **V.**

23 **CLASS ALLEGATIONS**

24 20. Plaintiff incorporates herein by reference each prior paragraph of this  
25 Complaint as if fully set forth herein.

26 21. Plaintiff seeks partial certification of class as to her claims pursuant to 42  
27 U.S.C. § 1981, and the DFEH regarding the policy of denying African Americans and  
28



HIGGINS LAW FIRM  
1017 N. La Cienega Blvd., Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

1 other minorities shifts, opportunities, and jobs, based on the preference of a patient.

2 Under the remaining claims Ross has, she does not seek certification.

3       22. **Class Definitions.** Plaintiff brings this civil class action on behalf of  
4 herself individually, and on behalf of all others similarly situated, consisting of all former  
5 employees of SDHP who were discriminated against by a policy of SDHP to deny African  
6 Americans and other minorities shifts, opportunities, and positions, and to make hiring  
7 decisions, staffing decisions, and employment decisions, based on patient preferences  
8 for non-minority caregivers. Specifically excluded from the class are Defendants, any  
9 entity in which they have a controlling interest, any of their parents, subsidiaries, and/or  
10 affiliates of Defendant; and any members of their immediate family.

11       23. This action may be properly brought and maintained as a class action as  
12 partially certified pursuant to section 382 of the California Code of Civil Procedure. This  
13 class action satisfies the numerosity, typicality, adequacy, predominance, and superiority  
14 requirements. Upon application by Plaintiffs' counsel for certification of the Plaintiffs'  
15 Class, the Court may also be requested to utilize and certify subclasses in the interests of  
16 ascertainability, manageability, justice, and/or judicial economy.

17       24. **Ascertainability.** This action may be properly brought and maintained as  
18 a class action because there is a well-defined community of interest in the litigation, and  
19 the members of the proposed Class are clearly and easily ascertainable and identifiable.  
20 The members of the Class can be readily ascertained from Defendants' business  
21 records. The Class members can be readily located and notified of this class action.

22       25. **Numerosity.** The number of persons within the Plaintiff Class is  
23 substantial, believed to amount to at least 50 persons. It is, therefore, impractical to join  
24 each member of the Class as a named Plaintiff. Utilization of the class action mechanism  
25 is the most economically feasible means of determining and adjudicating the merits of  
26 this litigation.

27       26. **Typicality.** The claims of Plaintiff are typical of the claims of the  
28

1 members of the Class, and the Plaintiff's interests are consistent with and not  
2 antagonistic to those of the other Class members Plaintiff seek to represent.

3 27. **Adequacy.** The Plaintiff class representatives have no interests that are  
4 adverse to, or which conflict with, the interests of the absent class members of the Class  
5 and are able to fairly and adequately represent and protect the interests of such Classes.  
6 Plaintiff has raised viable statutory claims of the type reasonably expected to be raised by  
7 members of the Class, and will vigorously pursue those claims. If necessary, Plaintiff  
8 may seek leave of this Court to amend this Complaint to include additional class  
9 representatives to represent the Class or additional claims as may be appropriate.

10 28. **Competency of Class Counsel.** Plaintiffs has retained and are  
11 represented by experienced, qualified, and competent counsel who are committed to  
12 prosecuting the class action. Counsel has experience in class action matters, and will  
13 assert and protect the rights and interests of Plaintiffs and absent Class Members.

14 29. **Commonality and Predominance.** Common questions of law and fact  
15 exist as to all members of the Class that predominate over any questions affecting only  
16 individual members of the Class. These common issues can be jointly tried. These  
17 common legal and factual liability questions, which do not vary from Class member to  
18 Class member, and which may be determined without reference to the individual  
19 circumstances of any Class member include, but are not limited to, the following:

20 (a) Whether Defendants' action constitute a violation of Section 1981 based on  
21 denying employees shifts and positions based on the racial preference of patients.

22 (b) **Superpriority.** Class actions serve an important function in the judicial  
23 system by providing a vehicle whereby the claims of many individuals can be resolved at  
24 the same time. The class action procedure both eliminates the possibility of repetitious  
25 litigation and provides claimants who may not have the means to retain counsel but for  
26 the mechanism of the class action, with redress. A class action is superior to other  
27 available methods for the fair and efficient adjudication of the controversy, since  
28 individual litigation of the claims of all Class members is impracticable. Even if every

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

1 member of the Class could afford to pursue individual litigation, the Court system could  
2 not. It would be unduly burdensome to the Courts in which individual litigation of  
3 numerous cases would proceed. Individualized litigation would also present the potential  
4 for varying, inconsistent, or contradictory judgments, and would magnify the delay and  
5 expense to all parties and to the Court system resulting from multiple trials of the same  
6 factual issues. By contrast, the maintenance of this action as a class action, with respect  
7 to some or all of the issues presented herein, presents few management difficulties,  
8 conserves the resources of the parties and of the Court system, and protects the rights of  
9 each member of the Class. Plaintiffs anticipate no difficulty in the management of this  
10 action as a class action.

11 30. Additionally, the prosecution of separate actions by individual Class  
12 Members may create a risk of multiple adjudications that would, as a practical matter, be  
13 dispositive of the interests of the other members of the Class not parties to such  
14 adjudications or that would substantially impair or impede the ability of such nonparty  
15 Class Members to protect their interests. The prosecution of individual actions by Class  
16 members could establish inconsistent results and result in establishing incompatible  
17 standards of conduct for Defendants.

### 18 FACTS

19 31. Plaintiff Ross began her employment with the Defendants when she was  
20 hired on or about June 9, 2009, as a nurse, in the crisis care unit.

21 32. At SDHP's San Diego facility, where Plaintiff Ross was most recently  
22 employed, there is a culture of racial bias.

23 33. That SDHP fosters and approves of a racially biased atmosphere is  
24 supported by the fact that the overwhelming majority of its employees in its San Diego  
25 Facility were Caucasian, and SDHP's hiring, retention, and promotion practices have  
26 intentionally discriminated against Ross and other minorities and have had a disparate  
27 impact on African Americans.

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

1 34. During her employment, Plaintiff Ross would receive unfavorable  
2 assignments, shifts, and tasks in the course of her employment. Defendants would  
3 change and deny Ross' assignments, shifts, and task, spontaneously and without  
4 explanation to Plaintiff Ross. Other similarly situated persons were promoted, but SDHP  
5 did not promote Plaintiff.

6 35. On or about April of 2010, Ross learned of racially discriminatory policies  
7 and practices SDHP had enacted. Specifically, she was informed by calendaring  
8 persons for SDHP not to show up for a shift with no explanation. Ross learned that this  
9 was based on Defendants' preference for "white" care providers and attendants, and  
10 based on Defendants' discrimination and demeaning view of African Americans and other  
11 minorities. Plaintiff Ross also learned from personnel for SDHP that scheduled shifts,  
12 that one of the outpatients of SDHP advised SDHP, "don't send that ni&\*er here [for  
13 treatment]." On or about this same time, Ross learned that SDHP had created a physical  
14 ledger book and other practices, acts and procedures whereby the racial preference for  
15 caregivers was notated for certain patients, honored, adopted, and ratified. The purpose  
16 of this book was to ensure African Americans and other minorities were not assigned to  
17 certain shifts, tasks, and assignments based on the racial preference of the patient and  
18 SDHP.

19 36. On or about May 3, 2010, Ross and a group of employees requested a  
20 meeting with supervisor Kimberly Sendra ("**Sendra**") to discuss and report the  
21 Defendants' discriminatory practices as it related to minorities at SDHP. Carol Lovci  
22 intervened and advised Ross and other employees they should meet individually with  
23 management. Employees felt intimidated by a request for individual meetings, and  
24 stated this. Human resources of SDHP advised Ross and certain employees that a  
25 meeting would be held on May 11, 2010 to discuss the practices that Ross had reported  
26 to Sendra.

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

1 37. On May 10, 2010, Ross reported to HR of SDHP, the anxiety, stress, and  
2 emotional impact, the racial discrimination and practices of SDHP had caused her. Ross  
3 also reported and discussed with HR, SDHP's failure to address the discrimination.

4 38. SDHP responded with an email that it "didn't care", and that Ross was  
5 required to report to work. Ross presented Defendant's with a Doctor's note verifying her  
6 illness.

7 39 On May 11, 2010, Ross, caucasian co-employee Erica Cartier, African  
8 American Tracy McKay, hispanic co-employee Jennifer Leos, Sendra, and Human  
9 Resource representative Attie Smith ("**Smith**"), and an additional employee (to be named  
10 through discovery) participated in the meeting regarding the discrimination of minorities at  
11 SDHP. During the meeting Sendra and Smith advised the employees including Ross,  
12 that there was nothing Defendants could do about the racial preferences of patients for  
13 whites and non-minorities, that Defendants had to assign tasks and shifts based on  
14 patient preferences, and that Defendants would take no action to alter the *status quo*.

15 40. On May 17, 2010, Ross was terminated.

16 41. On June 10, 2010, Ross filed a claim with the Equal Employment  
17 Opportunity Commission, assigned charge number 488-2010-00734, which has a work  
18 sharing agreement with the DFEH.

19 42. Ross received unemployment benefits ("**UE Benefits**") based on SDHP's  
20 termination of her. On August 23, 2010, SDHP claimed termination based on  
21 "misconduct related to most recent work" and appealed Ross' entitlement to  
22 unemployment benefits.

23 43. SDHP appealed the UE benefits awarded to Ross. SDHP lost the appeal,  
24 and the panel affirmed Ross' right to UE benefits.

25 44. On March 13, 2013, The Equal Employment Opportunity Commission  
26 ("**EEOC**") issued a determination (the "**Determination**") providing: "that the evidence  
27 obtained in the [EEOC] investigation establishes reasonable cause to believe that  
28 Respondent subjected Charging Party [Movant] to disparate terms and conditions of

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

1 employment based on her race, Black, in violation of Title VII of the Civil Rights Act of  
2 1964. More specifically, Respondent engaged in an unlawful employment practice by  
3 denying Charging Party job assignments based on race pursuant to practice of  
4 accommodating a customer's preference for an assigned employee based on race." The  
5 right to sue letter is appended hereto as Exhibit "A". The determination letter is  
6 appended hereto as Exhibit "B". The relief from stay order is appended hereto as Exhibit  
7 "C".

8 45. During her employment with SDHP, Plaintiff Ross performed her duties in  
9 a satisfactory and professional manner.

10 46. Despite her consistent performance, Plaintiff Ross was targeted by SDHP,  
11 which displayed a bias toward Plaintiff Ross on the basis of her race.

12 47. Ross was sent to the furthest locations away from her home based on her  
13 race and in an effort by SDHP to terminate her, and the patient preferences for non  
14 minority nurses.

15 48. That Plaintiff Ross's race was considered by SDHP in subjecting Ms. Ross  
16 to unwarranted criticism and discipline, in failing to promote her or give her periodic  
17 raises despite her qualifications, is evident from SDHP's actions.

18 49. Plaintiff Ross was retaliated against by SDHP as a result of her complaints,  
19 both written and verbal, regarding discrimination and harassment.

20 50. In addition to the actions and inactions of SDHP alleged herein, SDHP's  
21 policies, practices, and customs have a disparate impact on African-American workers.

22 51. Specifically, SDHP's policies with respect to promotion and discipline have  
23 a disparate impact on African-American employees in that African-American employees  
24 at SDHP are routinely denied promotions for which Caucasian employees are selected  
25 and are subjected to more frequent and harsher discipline than their Caucasian  
26 colleagues.

27 52. Further, SDHP routinely ignores complaints of discriminatory conduct and  
28 fails to enforce anti-discrimination, anti-harassment, and/or anti-retaliation policies.

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

53. The treatment alleged herein that Plaintiff Ross was subjected to by SDHP was motivated by discrimination on the basis of race, and in retaliation for Plaintiff's complaints about discrimination.

54. SDHP discriminated against and harassed Plaintiff Ross in violation of Title VII of the Civil Rights Act of 1964, the FEHA, and Section 1981.

55. Instead of appropriately investigating and addressing Plaintiff Leilani Ross's complaints of race discrimination and harassment, SDHP retaliated against Plaintiff Ross in violation of Title VII of the Civil Rights Act of 1964, the FEHA, and Section 1981.

56. SDHP was aware of the discrimination, harassment, and retaliation suffered by Plaintiff Ross, but failed to take any action to address the situation or prevent further discrimination, harassment, and retaliation.

57. SDHP has encouraged, tolerated, ratified and been deliberately indifferent to a series of actionable patterns, practices, and customs relating to training, supervision, investigation and discipline.

58. As a result of the race and age discrimination, harassment, and retaliation suffered by Plaintiff Ross, Plaintiff Ross suffered, and continues to suffer severe emotional distress.

59. SDHP and its agents acted with the intent of causing, or in reckless disregard of the probability that their actions would cause Plaintiff Ross severe emotional distress.

#### COUNT I

(Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e))

(As Against All Defendants)

60. Plaintiff Leilani Ross repeats and incorporates by reference the allegations of all previous paragraphs as fully as though the same were set forth at length herein.

61. Based on the foregoing, Defendant SDHP engaged in unlawful employment practices in violation of Title VII.



HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

62. Title 2 of the CRA proscribes discrimination by a commercial entity yielding to the racial preferences of its customers. In discriminating against, harassing, and retaliating against Plaintiff Ross because of her race and because of her complaints about race discrimination and harassment, Defendant SDHP violated Title VII of the Civil Rights Act of 1964.

63. Defendant's policies, practices, and customs regarding promotions, discipline and the reporting and investigation of employee complaints of discrimination and harassment had a disparate impact on African-American employees and other minorities in violation of Title VII.

64. Defendant's policies, practices, and customs of engaging in an unlawful employment practice by denying Plaintiff Ross job assignments based on race pursuant to practice of accommodating a customer's preference for an assigned employee based on race had a disparate impact on African-American employees and other minorities in violation of Title VII.

65. Said violations were intentional and willful.

66. Said violations warrant the imposition of punitive damages.

67. As the direct and proximate result of Defendant's violations of Title VII, Plaintiff Leilani Ross has sustained a loss of earnings, severe emotional and psychological distress, loss of self-esteem, loss of future earning power, as well as back pay, front pay, and interest due thereon along with and/or in addition to the damages and losses set forth herein.

68. Plaintiff Leilani Ross is now suffering and will continue to suffer irreparable harm and monetary damages as a result of Defendant's actions unless and until this Court grants the relief requested herein.

## COUNT II

(Civil Rights Act of 1866, 42 U.S.C. § 1981)

(Class Action Count As Against All Defendants)

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

69. Plaintiff Leilani Ross repeats and incorporates by reference the allegations of all previous paragraphs as fully as though the same were set forth at length herein.

70. Based on the foregoing, Defendant SDHP has engaged in unlawful employment practices in violation of the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981.

71. In discriminating against, harassing and retaliating against Plaintiff Ross because of her race and because of her complaints about race discrimination and harassment, Defendant SDHP violated the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981. In discriminating against and denying minorities at SDHP opportunities, shifts, promotions, and fostering a culture of racism and discrimination, Defendants violated Section 1981 of Ross, and all others similarly situated.

72. Said violations were intentional and willful.

73. Said violations warrant the imposition of punitive damages.

74. As the direct and proximate result of the Defendants' violation of Section 1981, Plaintiff Leilani Ross, and all others situated, have sustained a loss of earnings, severe emotional and psychological distress, loss of self-esteem, loss of future earning power, as well as back pay, front pay, and interest due thereon along with and/or in addition to the damages and losses set forth herein.

75. Plaintiff Leilani Ross is now suffering and will continue to suffer irreparable harm and monetary damages as a result of the Defendant's actions unless and until this Court grants the relief requested herein.

### **COUNT III**

#### **(Discrimination On The Basis Of Race, Ancestry, And National Origin in Violation Of FEHA (Government Code §§ 12900-12960) Against All Defendants**

76. The allegations set forth in the preceding paragraphs are re-alleged and incorporated herein by reference.

77. At all times herein mentioned, FEHA, Government Code sections 12900-12960, was in full force and effect and was binding on the defendant SDHP. These

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

1 statutes require defendant to refrain from discriminating against any employee on the  
2 basis of his/her race, ancestry, or national origin. Within the time provided by law,  
3 Plaintiff filed a complaint with the EEOC who has a work-share agreement with the  
4 Department of Fair Employment and Housing ("DFEH"), and later received a right-to-sue  
5 letter.

6 78. During Plaintiff's employment with Defendants through their supervisors,  
7 managers, and directors, engaged in intentional actions that resulted in Plaintiff being  
8 treated less favorably because of her race, ancestry, and/or national origin. Specifically,  
9 defendants maintained a systematic and continuous policy and goal of firing and  
10 demoting African Americans and other minorities, and created policies that caused Ross  
11 and other minorities employees to be denied shifts, employment opportunities, and equal  
12 rights.

13 79. As a proximate result of Defendants' discriminatory behavior toward  
14 Plaintiff, Plaintiff has suffered and continues to suffer humiliation, emotional distress, and  
15 mental and physical pain and anguish, all to her damage in a sum according to proof.

16 80. As a proximate result of Defendants' willful, knowing, and intentional  
17 discrimination against Plaintiff, Plaintiff has suffered and continues to suffer humiliation,  
18 emotional distress, and mental and physical pain and anguish, all to her damage in a  
19 sum according to proof.

20 81. Defendant's discrimination was done intentionally, in a malicious,  
21 oppressive manner, entitling Plaintiff to punitive damages.

22 82. Plaintiff has incurred, and continues to incur legal expenses and attorneys'  
23 fees in a sum according to proof.

24  
25 **COUNT IV**

26 **(Harassment On The Basis Of Race, Ancestry, And National Origin in Violation Of**  
27 **FEHA (Government Code §§ 12900-12960) Against All Defendants**

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd, Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

1 83. The allegations set forth in the preceding paragraphs are re-alleged and  
2 incorporated herein by reference.

3 84. At all times herein mentioned, FEHA, Government Code sections 12900-  
4 12960, was in full force and effect and was binding on the defendant SDHP. These  
5 statutes require defendant to refrain from harassing any employee on the basis of his/her  
6 race, ancestry, or national origin. Within the time provided by law, Plaintiff filed a  
7 complaint with the EEOC who has a work-share agreement with the Department of Fair  
8 Employment and Housing ("DFEH"), and later received a right-to-sue letter.

9 85. During Plaintiff's employment with Defendants through their supervisors,  
10 managers, and directors, engaged in intentional actions that resulted in Plaintiff being  
11 treated less favorably because of her race, ancestry, and/or national origin. Specifically,  
12 defendants maintained a systematic and continuous policy and goal of firing and  
13 demoting African Americans and other minorities, and created policies that caused Ross  
14 and other minorities employees to be denied shifts, employment opportunities, and equal  
15 rights.

16 86. As a proximate result of Defendants' harassing behavior toward Plaintiff,  
17 Plaintiff has suffered and continues to suffer humiliation, emotional distress, and mental  
18 and physical pain and anguish, all to her damage in a sum according to proof.

19 87. As a proximate result of Defendants' willful, knowing, and intentional  
20 harassment against Plaintiff, Plaintiff has suffered and continues to suffer humiliation,  
21 emotional distress, and mental and physical pain and anguish, all to her damage in a  
22 sum according to proof.

23 88. Defendant's harassment was done intentionally, in a malicious, oppressive  
24 manner, entitling Plaintiff to punitive damages.

25 89. Plaintiff has incurred, and continues to incur legal expenses and attorneys'  
26 fees in a sum according to proof.

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

**COUNT V**

**(Retaliation For Complaining Of Discrimination and Harassment On The Basis Of Race, Ancestry, And National Origin in Violation Of FEHA (Government Code §§ 12900-12960) Against All Defendants**

90. The allegations set forth in the preceding paragraphs are re-alleged and incorporated herein by reference.

91. At all times herein mentioned, FEHA, Government Code sections 12900-12960, was in full force and effect and was binding on the defendant SDHP. These statutes require defendant to refrain from harassing any employee on the basis of his/her race, ancestry, or national origin. Within the time provided by law, Plaintiff filed a complaint with the EEOC who has a work-share agreement with the Department of Fair Employment and Housing ("DFEH"), and later received a right-to-sue letter.

92. During Plaintiff's employment with Defendants through their supervisors, managers, and directors, engaged in intentional actions that resulted in Plaintiff being treated less favorably because of her race, ancestry, and/or national origin. Specifically, defendants maintained a systematic and continuous policy and goal of firing and demoting African Americans and other minorities, and created policies that caused Ross and other minorities employees to be denied shifts, employment opportunities, and equal rights.

93. After Plaintiff complained to Defendants repeatedly about being discriminated against and harassed in the work place because of her race, ancestry, and/or national origin, defendant constructively terminated her employment by allowing the mistreatment of Plaintiff to continue until Plaintiff was terminated.

94. As a proximate result of Defendants' retaliation against plaintiff, plaintiff has suffered and continues to suffer humiliation, emotional distress, and mental and physical pain and anguish, all to her damage in a sum according to proof.

95. As a proximate result of Defendants' willful, knowing, and intentional retaliation against Plaintiff, Plaintiff has suffered and continues to suffer humiliation,

1 emotional distress, and mental and physical pain and anguish, all to her damage in a  
2 sum according to proof.

3 96. Defendant's retaliation was done intentionally, in a malicious, oppressive  
4 manner, entitling Plaintiff to punitive damages.

5 97. Plaintiff has incurred, and continues to incur legal expenses and attorneys'  
6 fees in a sum according to proof.

7 **COUNT VI**

8 **(Failure To Prevent Discrimination And Harassment in Violation of FEHA**

9 **(Government Code ¶ 12940k) Class Action Count Against All Defendants**

10 98. The allegations set forth in the preceding paragraphs are re-alleged and  
11 incorporated herein by reference.

12 99. At all times herein mentioned, FEHA, Government Code section 12940(k),  
13 was in full force and effect and was binding on the defendant SDHP. The statute states  
14 that it is an unlawful employment practice in California for an employer "to fail to take all  
15 reasonable steps necessary to prevent discrimination and harassment from occurring."  
16 Prior to filing the instant Complaint, plaintiff Ross filed a complaint with the EEOC who  
17 has a work-share agreement with the Department of Fair Employment and Housing  
18 ("DFEH"), and later received a right-to-sue letter.

19 100. During the course of plaintiff's employment, Defendants failed to prevent  
20 employees from engaging in intentional actions that resulted in Plaintiff and all other  
21 situated, being treated less favorably because they are minorities. During the course of  
22 Plaintiff's employment, defendant failed to prevent its employees from engaging in  
23 unjustified employment practices against African American employees and other minority  
24 employees. During the course of Plaintiff's employment, Defendants failed to prevent a  
25 pattern and practice by its employees of intentional discrimination and harassment based  
26 upon race, national origin, and ancestry.

27 101. Defendant encouraged, sanctioned, and advised HR and staff of SDHP to  
28 create ledgers to deny persons shift positions based on their race, and to discuss with

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

1 patients that such racial preferences would be honored accommodated, ratified and  
2 adopted.

3 102. As a proximate result of Defendants' willful, knowing, and intentional failure  
4 to prevent discrimination against and harassment of plaintiff, plaintiff, and all those  
5 similarly situated, have suffered and continues to suffer humiliation, emotional distress,  
6 and mental and physical pain and anguish, all to her damage in a sum according to proof.

7 103. As a proximate result of Defendants' willful, knowing, and intentional failure  
8 to prevent discrimination against and harassment of plaintiff, Plaintiff and all others  
9 similarly situated, have suffered and continues to suffer humiliation, emotional distress,  
10 and mental and physical pain and anguish, all to her damage in a sum according to proof.

11 95. Defendants' conduct was done intentionally, in a malicious, oppressive  
12 manner, entitling Plaintiff to punitive damages.

13 96. Plaintiff and all others similarly situated, have incurred, and continues to  
14 incur legal expenses and attorneys' fees in a sum according to proof.

### 15 COUNT VII

#### 16 **Wrongful Termination Against All Defendants**

17 97. The allegations set forth in the preceding paragraphs are re-alleged and  
18 incorporated herein by reference.

19 98. The above-described conduct of defendants constitutes racial  
20 discrimination, retaliation, and wrongful termination of Plaintiff in violation of public policy  
21 embodied in the FEHA and Title VII.

22 99. As a result of defendants' wrongful termination of her, Plaintiff has suffered  
23 and continues to suffer damages, in the form of lost wages and other employment  
24 benefits, and severe emotional and physical distress, the exact amount of which will be  
25 proven at trial.

26 100. Defendants, and each of them, acted for the purpose of causing Plaintiff to  
27 suffer financial loss and severe emotional distress and physical distress and are guilty of  
28 oppression and malice, justifying an award of exemplary and punitive damages.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff respectfully requests that this Court enter judgment in her favor, and those similarly situated, and against Defendant SDHP:

a. Declaring that the acts and practices complained of herein violate Title VII;

b. Declaring that the acts and practices complained of herein violate Section 1981 and violate the rights of all class members;

c. Declaring that the acts and practices complained of herein violate the FEHA;

d. Awarding compensatory damages to Plaintiff Leilani Ross, and those similarly situated, to make them whole for all past and future lost earnings, benefits and earnings capacity which Plaintiff has suffered and will continue to suffer as a result of Defendant's conduct;

e. Awarding compensatory damages to Plaintiff Leilani Ross, and all those similarly situated, for past and future emotional upset, mental anguish, loss of reputation, humiliation, loss of life's pleasures and pain and suffering;

f. Awarding punitive damages to Plaintiff Leilani Ross and all those similarly situated;

g. Awarding liquidated damages to Plaintiff Leilani Ross;

h. Awarding the class costs of this action together with her reasonable attorneys' fees;

i. Awarding Plaintiff Leilani Ross, and those similarly situated, such other damages as are appropriate under Section 1981, and the FEHA; and

j. Awarding Plaintiff Leilani Ross, damages as appropriate under Title VII;

j. Granting such other and further relief as this Court deems just and proper.

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018



1  
2  
3 By: Gail Higgins  
4 Gail Higgins

5 Dated: May 16, 2014

6 Counsel To Plaintiff

7 *Leilani Ross, on behalf of herself and all others similarly*  
8 *situated*

9 **DEMAND FOR JURY TRIAL**

10 Plaintiffs hereby request a jury trial on all issues so triable.  
11

12  
13  
14 By: Gail Higgins  
15 Gail Higgins

16 Dated: May 16, 2014

17 Counsel To Plaintiff

18 *Leilani Ross, on behalf of herself and all others similarly*  
19 *situated*  
20  
21  
22  
23  
24  
25  
26  
27  
28

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

## EXHIBIT A

Case 1:09-cv-01179-MMJ Document 1-1 Filed 07/12/13 Page 1 of 139  
San Diego Local Office Desc Main Document Pg. 13 of 14



555 W. Beech Street, Suite 504  
San Diego, CA 92101  
Intake Information Group: (800) 669-4000  
Intake Information Group TTY: (800) 669-6820  
San Diego Status Line: (866) 408-8075  
San Diego Direct Dial: (619) 557-7249  
TTY (619) 557-5748  
FAX (619) 557-7274  
Website: [www.eeoc.gov](http://www.eeoc.gov)

Ms. Leilani Ross  
228 Roanoke Road  
El Cajon, CA 92020

Re: Leilani L. Ross v. San Diego Hospice  
EEOC Charge No.: 488-2010-00734

Dear Ms. Ross:

The Equal Employment Opportunity Commission has determined that efforts to conciliate this charge as required under Title VII of the Civil Rights Act of 1964, as amended, have been unsuccessful. This letter constitutes the notice required by 1601.25 of the Equal Employment Opportunity Commission's Procedural Regulations which provides that the Commission shall notify the parties in writing when it determines that further conciliation efforts would be futile or non-productive.

No further efforts to conciliate this case will be made by the Equal Employment Opportunity Commission. The Commission has determined that it will not bring a lawsuit. The issuance of the enclosed Notice of Right to Sue concludes the processing of your charge by the Commission. If you decide to sue, you must file a complaint in Federal District Court within 90 days from the receipt of the Notice of Right to Sue.

On Behalf of the Commission

A handwritten signature in black ink, appearing to read "Marla B. Stern-Knowlton", is written over a horizontal line.

Marla B. Stern-Knowlton, Director  
San Diego Local Office

7/12/13  
\_\_\_\_\_  
Date

cc:  
Ms. Shauna L. Sinnott  
ANDREWS LAGASSE BRANCH & BELL LLP  
4365 Executive Drive, Ste. 950  
San Diego, CA 92121

Case 13-01179-MM11, Claim 237, Filed 09/12/13, Desc Main Document Pg. 14 of 14  
EEOC Form 161-A (11/09) U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

**NOTICE OF RIGHT TO SUE  
(CONCILIATION FAILURE)**

To: Lailani L. Ross  
228 Roanoke Road  
El Cajon, CA 92020

From: San Diego Local Office  
555 W. Beach Street  
Suite 504  
San Diego, CA 92101



On behalf of person(s) aggrieved whose identity is  
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.

EEOC Representative

Telephone No.

488-2010-00734

Maria B. Stern-Knowlton,  
Local Office Director

(619) 557-7284

**TO THE PERSON AGGRIEVED:**

This notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

**- NOTICE OF SUIT RIGHTS -**

(See the additional information attached to this form.)

**Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act:** This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed WITHIN 90 DAYS of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

**Equal Pay Act (EPA):** EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission



7/2/13

Enclosures(s)

Maria B. Stern-Knowlton,  
Local Office Director

(Date Mailed)

cc: Dana Bryco  
Human Resources Director  
SAN DIEGO HOSPICE  
4311 3rd Avenue  
San Diego, CA 92103

Ms. Shauna L. Sinnott  
ANDREWS LAGASSE BRANCH & BELL LLP  
4385 Executive Drive, Ste. 950  
San Diego, CA 92121

## EXHIBIT B

Case 13-01179-MM11 Claim 237 Filed 09/12/13 Desc Main Document Pg. 11 of 14  
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
San Diego Local Office



555 West Beech Street, Suite 304  
San Diego, CA 92101  
National Contact Center: (800) 669-4000  
National Contact Center TTY: (800) 669-6820  
San Diego Status Line: (866) 408-8075  
San Diego Direct Dial: (619) 557-7235  
TTY (619) 557-5748  
FAX (619) 557-7274

Charge No.: 488-2010-00734

Charging Party

Leilani Ross  
228 Roanoke Road  
El Cajon, CA 92020

Respondent

San Diego Hospice  
404 Camino del Rio South  
Suite 200  
San Diego, CA 92108

### DETERMINATION

Under the authority vested in me by the Equal Employment Opportunity Commission (EEOC), I issue the following determination as to the merits of the subject charge filed under the Title VII of the Civil Rights Act of 1964, as amended. All requirements for coverage have been met.

Charging Party alleged that she was subjected to Respondent's discriminatory employment practice by denying her job assignments based on her race, Black, pursuant to a practice of accommodating customer preference for non-Black Nurses (LVNs). Charging Party further alleged that she was discharged in retaliation for having complained about this discriminatory employment practice.

Respondent denies Charging Party's allegations.

I have determined that the evidence obtained in the investigation establishes reasonable cause to believe that Respondent subjected Charging Party to disparate terms and conditions of employment based on her race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended. More specifically, Respondent engaged in an unlawful employment practice by denying Charging Party job assignments based on race pursuant to a practice of accommodating a customer's preference for an assigned employee based on race.

No finding is made with respect to the retaliatory discharge allegation.

Respondent is reminded that Federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who have cooperated in Commission investigation is also prohibited. These protections apply regardless of the Commission's determination on the merits of the charge.

Case 13-01179-MM11 Claim 237 Filed 09/12/13 Desc Main Document Pg. 12 of 14

**LETTER OF DETERMINATION**  
**Leilani Ross v San Diego Hospice**  
**EEOC No.: 488-2010-00734**  
**Page 2 of 2 Pages**

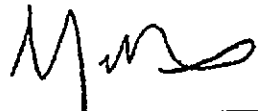
Upon finding there is reasonable cause to believe that violations have occurred the Commission attempts to eliminate the alleged unlawful practices by informal methods of conference, conciliation and persuasion. Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. The confidentiality provisions of Section 107 of the Title VII and Commission Regulations apply to information obtained during conciliation.

Where the Respondent declines to enter into settlement discussions or the Commission is unable to secure a settlement acceptable to the District Director, the Director shall so inform the parties in writing and advise them of the court enforcement alternative available to the EEOC.

A representative of the Commission will be in contact with you to determine your interest in participating in conciliation discussions.

On Behalf of the Commission:

9/13/13  
Date

  
\_\_\_\_\_  
Marla Stern-Knowlton, Director  
San Diego Local Office

## EXHIBIT C



Case 13-01179-MM11 Filed 05/08/14 Entered 05/08/14 13:20:49 Doc 860 Pg. 1 of 10

CSD 1001A [11/15/04] ORDER OF THE COURT

Name, Address, Telephone No. & T.D. No.

Samuel R. Maizel (CA Bar No. 189301)  
Scotta E. McFarland (CA Bar No. 165391)  
Jeffrey L. Kandel (CA Bar No. 115832))  
PACHULSKI STANG ZIEHL & JONES LLP  
10100 Santa Monica Blvd., 13th Floor  
Los Angeles, California 90067-4100  
Telephone: 310/277-6910  
Facsimile: 310/201-0760  
Email: smaizel@pszjlaw.com  
smcfarland@pszjlaw.com  
jkandel@pszjlaw.com

Counsel for Richard Kipperman, the Liquidating Trustee

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
325 West "F" Street, San Diego, California 92101-6991

In Re.  
SAN DIEGO HOSPICE & PALLIATIVE  
CARE CORPORATION,

Debtor.

BANKRUPTCY NO. 13-01179-MM11

TBG-1

Date of Hearing: June 5, 2014

Time of Hearing: 2:00 p.m.

Name of Judge: Judge Mann

**ORDER APPROVING STIPULATION BY AND BETWEEN THE LIQUIDATING TRUST AND LEILANI ROSS RESOLVING MOTION FOR RELIEF FROM AUTOMATIC STAY**

IT IS ORDERED THAT the relief sought as set forth on the continuation pages attached and numbered two (2) through 2 or a total of 2 pages, is granted. Stipulation Docket Entry No. 857.

//

//

//

DATED: May 8, 2014

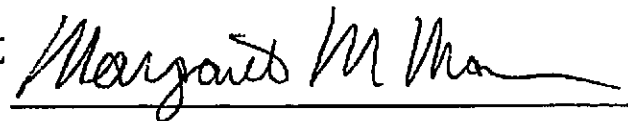
Signature by the attorney constitutes a certification under Fed. R. of Bankr. P. 9011 that the relief in the order is the relief granted by the court.

Submitted by:

Pachulski Stang Ziehl & Jones LLP

By: s/ Jeffrey L. Kandel

Attorney for ☒ Movant ☐ Respondent



Judge, United States Bankruptcy Court

Case 13-01179-MM11 Filed 05/08/14 Entered 05/08/14 13:20:49 Doc 860 Pg. 2 of 10  
CSD 1001A [11/15/04] (Page 2)

**ORDER APPROVING STIPULATION BY AND BETWEEN THE LIQUIDATING TRUST AND LEILANI ROSS RESOLVING MOTION FOR RELIEF FROM AUTOMATIC STAY**

DEBTOR: San Diego Hospice and Palliative Care Corporation

CASE NO: 13-01179-MM11

The Court having considered the attached Stipulation By And Between The Liquidating Trust And Leilani Ross Resolving Motion For Relief From Automatic Stay, (the "Stipulation") [Docket No. 857] and good cause appearing therefor

1. The Stipulation is approved.
2. The Court retains jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of the Stipulation and this Order.

Samuel R. Maizel (CA Bar No. 189301)  
Scotta E. McFarland (CA Bar No. 165391)  
Jeffrey L. Kandel (CA Bar No. 115832)  
PACHULSKI STANG ZIEHL & JONES LLP  
10100 Santa Monica Blvd., Suite 1300  
Los Angeles, CA 90067-4003  
Telephone: 310/277-6910  
Facsimile: 310/201-0760  
E-mail: smaizel@pszjlaw.com  
smcfarland@pszjlaw.com  
jkandel@pszjlaw.com

Attorneys for Liquidating Trustee and SDH Trust  
Committee

UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re:  
SAN DIEGO HOSPICE & PALLIATIVE CARE  
CORPORATION,  
Debtor and Debtor in Possession

Case No.: 13-01179-MM11

**STIPULATION BY AND BETWEEN  
THE LIQUIDATING TRUST AND  
LEILANI ROSS RESOLVING  
MOTION FOR RELIEF FROM  
AUTOMATIC STAY**

**Hearing:**

Date: June 5, 2014  
Time: 2:00 p.m.  
Courtroom: 1  
Room: 218  
Judge: Hon. Margaret M. Mann

This Liquidating Trust (the "Liquidating Trust") of San Diego Hospice & Palliative Care Corporation, the former debtor in possession (the "Debtor") in the above-captioned chapter 11 case (the "Case"), through Richard M Kipperman, the Liquidating Trustee (the "Liquidating Trustee") of the Liquidating Trust, and Leilani Ross ("Ross" and together with the Liquidating Trustee, the "Parties"), hereby stipulate (the "Stipulation") and agree as follows in accordance with the following facts and recitals:

Recitals

WHEREAS, on February 4, 2013, the Debtor filed a voluntary petition under chapter 11 of Title 11, United States Code, commencing the Case.

WHEREAS, on September 23, 2013 (the "Confirmation Date"), the Court entered its Order confirming the *First Amended Liquidating Plan for San Diego Hospice and Palliative Corporation (June 24, 2013), as Modified on August 27, 2013 and September 18, 2013 Jointly Proposed by the Debtor and the Official Committee of Unsecured Creditors* (the "Plan") [Docket No. 615]. The Effective Date of the Plan was October 8, 2013. Pursuant to the Plan, on or after the Effective Date, the Liquidating Trust succeeded to the assets of the Debtor and, *inter alia*, was charged with assessing, objecting to and compromising claims asserted in the Case. Richard M Kipperman was selected to serve as the Liquidating Trustee of the Liquidating Trust.

WHEREAS, on October 8, 2013, Ross filed her *Emergency Motion to (1) Modify the Automatic Stay to Liquidate Claim in State Court or District Court and (2) for Relief From Plan Injunction to Liquidate Claim in State Court or District Court* [Docket No. 648] (the "Emergency Motion"). Thereafter, (1) on October 9, 2013, the Liquidating Trustee filed an opposition thereto [Docket No. 654]; (2) on November 6, 2013, the Liquidating Trustee filed a supplemental opposition thereto [Docket No. 679]; and (3) on November 14, 2013, Ross filed a reply to the Liquidating Trustee's supplemental opposition [Docket No. 692].

WHEREAS, the hearing with respect to the Emergency Motion was originally scheduled for October 10, 2013, and was continued pursuant to stipulation of the Parties [Docket No. 656] and order of this Court [Docket No. 664] in order to enable the Liquidating Trustee to review any policies of insurance which may apply to the claims raised by Ross and, based thereon, to engage in negotiations with both the insurer and Ross to determine whether the Parties can reach a consensual resolution of the issues raised in the Motion.

WHEREAS, the hearing with respect to the Emergency Motion is currently scheduled for May 1, 2014 at 2:00 p.m. EDT.

WHEREAS, the Debtor's Directors and Officers Liability Policy issued by RSUI Indemnity Company (the "Insurer") as Policy Number NHP633756 as a renewal of Policy Number

1 NHP629630 (the "Policy") contains a self-insured retention (the "Retention") of \$50,000 per claim  
2 at Item 4 of the Declarations (the "Retention Amount") and limits the Insurer's liability to  
3 \$3,000,000 at Item 3 of the Declarations (the "Policy Limit").

4 **WHEREAS**, the Liquidating Trustee and Ross agreed to toll all claims Ross asserts until ten  
5 days after entry of an order resolving the Emergency Motion.

6 **WHEREAS**, the Liquidating Trustee and Ross have reached a settlement of the issues raised  
7 in the Emergency Motion and the Liquidating Trustee has determined and believes that the  
8 settlement set forth in this Stipulation in connection with the Motion is fair and reasonable and in the  
9 best interests of creditors and beneficiaries of the Liquidating Trust.

10 **NOW, THEREFORE, IT IS STIPULATED** by the undersigned parties as follows:

11 1. The Parties agree that Ross shall be relieved from the automatic stay of 11 U.S.C.  
12 §362 and any injunction under the Plan to commence litigation outside of the Bankruptcy Court as  
13 described in the Emergency Motion (the "Litigation"), subject to the following terms and conditions.

14 2. The Liquidating Trust agrees to advance up to the full Retention Amount under the  
15 Policy. If Ross obtains a recovery in the Litigation (the "Recovery"), Ross shall refund the  
16 Liquidating Trust in the amount equal to the lesser of (a) one-half of the amount of the Recovery,  
17 and (b) 50% of the Retention Amount (i.e. 50% of \$50,000, or \$25,000) (the "Retention Refund").  
18 By way of illustration, (y) if the Recovery is \$250,000, the maximum Retention Refund owed by  
19 Ross to the Liquidating Trust shall be \$25,000, and (z) if the Recovery is \$30,000, the maximum  
20 Retention Refund owed by Ross to the Liquidating Trust shall be \$15,000. If Ross receives no  
21 Recovery, Ross shall not be obligated to pay the Retention Refund.

22 3. Any claim by Ross against the above-captioned chapter 11 estate and the Liquidating  
23 Trust shall be limited to the amount of any judgment obtained in the Litigation (up to a maximum of  
24 \$2,950,000), less any amounts actually paid by the Insurer to Ross. Other than the foregoing, Ross  
25 does not assert and shall not be allowed (i) any other claim of any nature, whether secured,  
26 administrative, priority or general unsecured, against the Liquidating Trust or the above-captioned  
27 chapter 11 estate, or (ii) any right in or to any portion of the assets of the Liquidating Trust.

1 4. The above-referenced hearing shall be taken off calendar upon entry of an order of  
2 the Bankruptcy Court approving this Stipulation.

3 5. This Stipulation shall be deemed to resolve the Emergency Motion, and any further  
4 statute of limitations concerning Ross' claims are further tolled until ten days after entry of this  
5 Order.

6 6. The Liquidating Trustee and Ross each warrant that they are authorized to enter into  
7 this Stipulation. Each individual signing this Stipulation on behalf of any party represents and  
8 warrants that he has full authority to do so.

9 7. This Stipulation may be signed in counterpart originals, which, when fully executed,  
10 shall constitute a single original. Any signature delivered by a party by email or facsimile  
11 transmission shall be deemed an original signature hereto.

12 8. The Court shall retain jurisdiction to hear all disputes arising under this Stipulation.

13 Dated: 2 May, 2014

Dated: 4/24, 2014

14  
15 The Liquidating Trust

Lellani Ross

16 By: [Signature]  
17 Richard M Klipperman, Trustee

[Signature]

18  
19 Approved as to form:

20 Pachulski Stang Ziehl & Jones LLP

Law Offices of Gail Higgins

21 By: /s/ Jeffrey L. Kandel

By: \_\_\_\_\_

22 Jeffrey L. Kandel

Gail Higgins

PACHULSKI STANG ZIEHL & JONES LLP  
ATTORNEYS AT LAW  
SAN ANTONIO, TEXAS

4. The above-referenced hearing shall be taken off calendar upon entry of an order of the Bankruptcy Court approving this Stipulation.

5. This Stipulation shall be deemed to resolve the Emergency Motion, and any further statute of limitations concerning Ross' claims are further tolled until ten days after entry of this Order.

6. The Liquidating Trustee and Ross each warrant that they are authorized to enter into this Stipulation. Each individual signing this Stipulation on behalf of any party represents and warrants that he has full authority to do so.

7. This Stipulation may be signed in counterpart originals, which, when fully executed, shall constitute a single original. Any signature delivered by a party by email or facsimile transmission shall be deemed an original signature hereto.

8. The Court shall retain jurisdiction to hear all disputes arising under this Stipulation.

Dated: \_\_\_\_\_, 2014

Dated: April 24, 2014

The Liquidating Trust

Leilani Ross

By: \_\_\_\_\_

Leilani Ross

Richard M Kipperman, Trustee

Approved as to form:

Pachulski Stang Ziehl & Jones LLP

Law Offices of Gail Higgins

By: \_\_\_\_\_

By: *Gail Higgins*

Jeffrey L. Kandel

Gail Higgins

## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:  
10100 Santa Monica Boulevard, 13<sup>th</sup> Floor, Los Angeles, CA 90067

A true and correct copy of the foregoing document entitled (*specify*): **STIPULATION BY AND BETWEEN THE LIQUIDATING TRUST AND LEILANI ROSS RESOLVING MOTION FOR RELIEF FROM AUTOMATIC STAY** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On May 2, 2014, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☒ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:

On May 2, 2014, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served)**: Pursuant to F.R.Civ.P. 6 and/or controlling LBR, on May 2, 2014, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

May 2, 2014  
Date

Rolanda Mori  
Printed Name

/s/ Rolanda Mori  
Signature



- Jamie Altman jamie.altman@procopio.com,  
kristina.terlaga@procopio.com;calendaring@procopio.com
- Everett G. Barry ebarry@mulvaneybarry.com,  
gcurtis@mulvaneybarry.com;ktran@mulvaneybarry.com
- Steven M. Berman SBerman@slk-law.com, ssstirling@slk-law.com
- Jess R. Bressi jbressi@mckennalong.com, ksigismondo@mckennalong.com
- Steven K. Brumer sbrumer@brumerlawfirm.com
- Jeffrey D. Cawdrey jcawdrey@gordonrees.com,  
ebojorquez@gordonrees.com;slemos@gordonrees.com
- William R. Cumming cumming@cummingandassociateslaw.com
- Joseph R. Dunn jrdunn@mintz.com,  
tlmayo@mintz.com;jadavis@mintz.com;aobrient@mintz.com;dsjohnson@mintz.com;docketing@mintz.com
- Amir Gamliel agamliel@perkinscoie.com
- Thomas B. Gorrell tgorrell@gorillalaw.com
- Christopher V. Hawkins hawkins@sullivanhill.com,  
vidovich@sullivanhill.com;hill@sullivanhill.com;lriarte@sullivanhill.com;stein@sullivanhill.com;cruz@sullivanhill.com;millerick@sullivanhill.com;gubba-reiner@sullivanhill.com;ggarcia@sullivanhill.com
- Gail Higgins ghigginse@aol.com
- Haeji Hong Haeji.Hong@usdoj.gov, USTP.Region15@usdoj.gov,tiffany.l.carroll@usdoj.gov
- Jeffrey Isaacs jeffrey.isaacs@procopio.com,  
gpk@procopio.com;kristina.terlaga@procopio.com;calendaring@procopio.com;efile-bank@procopio.com
- Jeffrey Isaacs jeffrey.isaacs@procopio.com,  
gpk@procopio.com;kristina.terlaga@procopio.com;calendaring@procopio.com;efile-bank@procopio.com
- Jeffrey Kandel jkandel@pszjlaw.com
- Jeffrey Kandel jkandel@pszjlaw.com
- Teddy Kapur tkapur@pszjlaw.com
- Grant C. Keary gck@dlklaw.com
- Dean T. Kirby dkirby@kirbymac.com,  
jwilson@kirbymac.com;rrobinson@kirbymac.com;Jacquelyn@ecf.inforuptcy.com;twright@kirbymac.com,hmares@kirbymac.com
- Andy Kong Kong.Andy@ARENTFOX.COM
- K Kenneth Kotler kotler@kenkotler.com

- Kristin Lamar  
klamarecf01@gmail.com,NChawlaecf01@gmail.com,IGN@NewChapterLaw.com,ecf@NewChapterLaw.com
- Lynne R. Lasry llasry@sllbv.com
- Paul J Leeds leedsp@higgslaw.com, reisingc@higgslaw.com
- Paul J Leeds leedsp@higgslaw.com, reisingc@higgslaw.com
- Samuel R. Maizel smaizel@pszjlaw.com, mkulick@pszjlaw.com
- Samuel R. Maizel smaizel@pszjlaw.com, mkulick@pszjlaw.com
- Scotta McFarland smcfarland@pszjlaw.com
- Dawn A. Messick dmessick@foley.com
- Elaine Nguyen Elaine@wsrlaw.net, megan@wsrlaw.net;tdorros@dorroslaw.com;Blake@lawbl.com
- Elaine Nguyen Elaine@wsrlaw.net, megan@wsrlaw.net;tdorros@dorroslaw.com;Blake@lawbl.com
- Martin W. Phillips marty.phillips@att.net
- Gerald N. Sims jerrys@psdslaw.com, bonniec@psdslaw.com
- Kelly Ann Mai Khanh Tran ktran@mulvaneybarry.com, lbrayton@mulvaneybarry.com
- Matthew Troy Matthew.Troy@usdoj.gov
- United States Trustee ustp.region15@usdoj.gov
- Stacie Yee stacie.yee@squiresanders.com,  
Bradley.Cosman@squiresanders.com;derek.judd@squiresanders.com

# EXHIBIT 2

Gail J. Higgins (CA Bar No. 164989)  
*ghigginse@aol.com*

**Higgins Law Firm**  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
Telephone: 310.409.7080  
Facsimile: 310.388.1018

Bankruptcy Counsel for Leilani Ross  
Creditor

**UNITED STATES BANKRUPTCY COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

In re

Case No.: 13-01179-MM11

Chapter 11

SAN DIEGO HOSPICE & PALLIATIVE  
CARE CORPORATION,

Debtor and Debtor in  
Possession.

**EMERGENCY MOTION TO (1) MODIFY  
THE AUTOMATIC STAY TO LIQUIDATE  
CLAIM IN STATE COURT OR DISTRICT  
COURT AND (2) FOR RELIEF FROM  
PLAN INJUNCTION TO LIQUIDATE  
CLAIM IN STATE COURT OR DISTRICT  
COURT; DECLARATION OF LEILANI  
ROSS AND GAIL HIGGINS IN SUPPORT  
THEREOF**

Date: [To Be Determined]  
Time: [To Be Determined]  
Courtroom: 1  
Room: 218  
Judge: Hon. Margaret M. Mann

The Movant, Leilani Ross ("**Movant**"), hereby requests the Court modify the  
automatic stay and plan injunction based upon the following:

**NEED FOR EMERGENCY RELIEF**

Movant is a former employee of San Diego Hospice & Palliative Care Corporation  
("**Debtor**") who was terminated on May 17, 2010. The Equal Employment Opportunity  
Commission ("**EEOC**") issued a determination (the "**Determination**") relating to Movant's  
employment relationship providing: "that the evidence obtained in the [EEOC]  
investigation establishes reasonable cause to believe that Respondent subjected  
Charging Party [Movant] to disparate terms and conditions of employment based on her

1 race, Black, in violation of Title VII of the Civil Rights Act of 1964. More specifically,  
2 Respondent engaged in an unlawful employment practice by denying Charging Party job  
3 assignments based on race pursuant to practice of accommodating a customer's  
4 preference for an assigned employee based on race." A true and correct copy of the  
5 Determination is attached to the Declaration of Leilani Ross ("**Ross Decl.**") as Ex. "A".  
6 The EEOC issued its Notice of Right ("**Notice**") to Sue on July 2, 2013, indicating that a  
7 suit must be filed within 90 days of Movant's receipt of the Notice. A true and correct  
8 copy of the Notice is attached to the Ross Decl. as Exhibit "B". Ross received the Notice  
9 from the EEOC on July 16, 2013.

10 On September 12, 2013, Ross filed, in *pro per*, her objection to confirmation of  
11 Debtor's Plan and proof of claim with the Court, docketed as claim 237 on the Court's  
12 claim register. In the letter accompanying Movant's objection, Movant outlined her  
13 struggles to retain counsel, and efforts to contact the Committee of Unsecured Creditors  
14 (the "**Committee**") and other attorneys representing parties in the case. Ross eventually  
15 made contact with Committee Counsel, Samuel Maizel, on September 19, 2013, and  
16 requested that the Committee stipulate to relief from stay. Mr. Maizel informed Ross the  
17 Committee would consider the request, but that he would prefer she had counsel before  
18 dealing with him. Movant was not able to retain counsel until October 7, 2013, the date  
19 of the filing of this Motion.

20 **Emergency Relief is essential to protect Movant's rights as a creditor. The**  
21 **Notice period following a right to sue is akin to a "statute of limitations." While**  
22 **Movant believes the fact the Bankruptcy Case was pending when the Notice was**  
23 **issued, circumstances after the Notice was rendered including the Committee's**  
24 **reluctance to stipulate to relief from stay unless Movant had counsel, and the**  
25 **extension of bar date for former employees, constitute equitable tolling and/or an**  
26 **extension of her right to sue beyond 90 days from receipt and/or that the filing of**  
27 **her claim with the Bankruptcy Court may satisfy her "claims made" suit**  
28 **requirement. In addition, certain state and federal claims may not be subject to the**

1 requirement. Movant nonetheless seeks emergency relief from stay and the Plan  
2 injunction so she can formally file a complaint on or before October 11, 2013. This  
3 will assure Movant's venue of choice and will allow her to avoid an argument that  
4 her administrative requirements were not exhausted, her other arguments  
5 notwithstanding.

6 Therefore, Movant requests a hearing on October 10, 2013. Movant notes  
7 that there is a hearing in this bankruptcy case on another motion for relief from  
8 stay, [Dkt. No. 606] to proceed with employment litigation scheduled for October  
9 10, 2013, at 3:00 P.M. The hearing on this Motion could be heard on the same date  
10 and time.

#### 11 FACTUAL SUMMARY

12 San Diego Hospice & Palliative Care Corporation ("**Debtor**") filed its Chapter 11  
13 petition with the Court on February 4, 2013. Movant, Leilani Ross was not scheduled in  
14 the case and is a former employee of the Debtor. On May 17, 2010, Movant was  
15 terminated by the Debtor.

16 Movant intends to file a complaint based on wrongful termination, racial  
17 discrimination, and other violations of California employment law. A copy of the draft  
18 complaint is attached to Ross Decl. as Exhibit "C". The draft is subject to further edits,  
19 and the right to assert California causes of action based on Ross's dispute.

20 The Debtor's Disclosure Statement indicates there is an insurance policy with a  
21 policy limit of \$3.0 million dollars ("**Insurance Policy**"), a policy that likely covers  
22 Movant's claim.

23 Leilani Ross is asking the Court to provide relief from the Plan injunction and/or  
24 relief to modify the automatic stay so that she may proceed to adjudicate her claims in  
25 the Superior Court. Movant will agree to limit her recovery to the limits of the Debtor's  
26 insurance policy. She has filed a proof of claim in the case for \$1,300,000.00, but such  
27 claim may be more based on proof at trial [Claim 237].  
28

1 The factors traditionally utilized by bankruptcy courts in granting relief from stay to  
2 allow litigation to proceed to liquidate a claim against the debtor are all present here.  
3 None of the factors weigh against granting the Movant relief from stay. A balance of the  
4 hardships tips in favor of the Movant. The factors Courts consider in granting relief from  
5 a Plan injunction are also present. Relief from stay and the plan injunction should be  
6 granted to allow the Movant to liquidate her claim.

7 **LEGAL ANALYSIS**

8 **A. 11 U.S.C. Section 524(e) Permits Ross To Proceed Against Debtor To**  
9 **Prove Liability In Order To Recover From Insurer**

10 Although Debtor did not receive a discharge in this Chapter 11 case, as a  
11 liquidating debtor is not entitled to a discharge under the Bankruptcy Code, Courts have  
12 analogized a Plan injunction to an exception to discharge in 524(e) and held a Plan  
13 injunction "is not intended to and does not protect third parties such as liability insurers."  
14 *In re HNRC Dissolution Co.*, Slip Opinion Case No. 03-14261 (Bank. E.D.K.Y 2006)  
15 (overruling liquidating trustee's objection to relief from the plan injunction and relief from  
16 stay filed by a creditor seeking recovery from insurance policy). A copy of the *HNRC*  
17 opinion is appended to the Ross Decl. as Exhibit "D".

18 Movant's primary source of recovery on her claim will likely be the Insurance  
19 Policy given the low proposed pro rata payout to unsecured creditors estimated in the  
20 Plan. Movant seeks emergency relief from the Plan injunction and stay in the first  
21 instance to seek recovery against Insurance Policy, and to the extent not covered,  
22 against the Debtor.

23 **B. Cause Exists to Grant Relief from the Automatic Stay**

24 11 USC section 362(d)(1) provides that the Bankruptcy Court may grant relief from  
25 the automatic stay "for cause." Whether "cause" exists is determined on a case by case  
26 basis and has been found in circumstances where the interests of justice and judicial  
27 economy weigh in favor of the liquidation of state law claims against a debtor in a state-  
28 forum and not in the Bankruptcy Court. *See, In re Castlerock Properties*, 781 F.2d 159,



1 163 (9th Cir. 1986). A variety of cases have analyzed whether or not cause exists for  
2 granting relief from the automatic stay where state court litigation is pending at the time a  
3 bankruptcy case is filed.

4 The burden of proof on a motion to modify the stay is a shifting one. *In re*  
5 *Plumberex Specialty Products, Inc.*, 311 BR 551, 557 (Bankr.C.D. Cal. 2004). To obtain  
6 relief, the movant must make an initial showing of "cause"; once established, the burden  
7 shifts to the debtor to show that relief is unwarranted. *Id.*; *In re Sonnax Indus., Inc.*, 907  
8 F.2d 1280, 1285 (2nd Cir. 1990). While there is no bright line definition of what  
9 constitutes "cause" for purposes of lifting the stay under Section 362(d)(1), courts in the  
10 Ninth Circuit have granted relief to permit the conclusion of litigation of state law claims in  
11 state court, particularly where the state law action involves multiple parties or is ready for  
12 trial. *See, In re Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9th Cir. 1990). The legislative  
13 history to Section 362 makes clear Congress' intention in that regard: "[I]t will often be  
14 more appropriate to permit proceedings to continue in their place of origin, where no  
15 great prejudice to the bankruptcy estate would result, in order to leave the parties to their  
16 chosen forum and to relieve the bankruptcy court from many duties that may be handled  
17 elsewhere." *In re Plumberex Specialty Products, Inc.*, 311 B.R. 551, 557 (Bankr.C.D.Cal.  
18 2004); *In re Universal Church, Inc.*, 127 B.R. 453, 455 (Bankr.E.D.Cal. 1991), *citing* H.R.  
19 No. 95-595, 95th Cong., 1<sup>st</sup> Sess. (1977), p. 343, 1978 U.S. Code Cong. & Admin. News  
20 5787, 6300 ("a desire to permit an action to proceed to completion in another tribunal  
21 may provide cause for relief from stay").

22 Courts have devised various factors to consider in determining whether the stay  
23 should be lifted to allow a creditor to continue pending litigation in a non-bankruptcy  
24 forum. While the specific factors are not strictly uniform among the courts, the most oft-  
25 cited list of factors comes from the *Curtis* opinion which have come to be known as the  
26  
27  
28

"Curtis Factors." While the complete list of Curtis Factors are twelve in number<sup>1</sup>, not all factors will be relevant in every case, nor is a court required to give each factor equal weight in making a determination. *In re Plumberex Specialty Products, Inc.*, 311 B.R. 551, 560 (C.D.Cal. 2004). An analysis of those factors that are relevant to the instant case reveals that lifting the stay is both appropriate and warranted.

Not every one of the Curtis Factors applies and, therefore, need be considered in a given matter. In this case factors 3, 4, 6, 8, and 9 are neutral and/or inapplicable. The other factors support granting relief from stay so the Movant's claim can be liquidated.

### **1. Relief Should Result In Complete Resolution of the Issues.**

The Movant has agreed to limit her recovery to the limits of the insurance policy the Debtor carried for employment practices. Based upon the sum set forth in the Movant's proof of claim, that claim is well within the \$3.0 Million limit of the Debtor's policy. Relief from the stay will result in the liquidation of Movant's claim and payment from the insurance proceeds. If the claim is determined not to be covered under the policy for Debtor's employment practices, the state court will nonetheless have assisted

- 
1. The Curtis Factors include: (1) Whether the relief requested will result in a partial or complete resolution of the issues; (2) The lack of any connection with or interference with the bankruptcy case; (3) Whether the foreign proceeding involves the debtor as a fiduciary; (4) Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases; (5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation; (6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question; (7) Whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties; (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c); (9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f); (10) The interests of judicial economy and expeditious and economical determination of litigation for the parties; (11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial; and (12) The impact of the stay on the parties and the "balance of hurt." *In re Curtis*, 40 B.R. 795,799-800 (Bankr. D.Utah 1984).

1 this Chapter 11 case by liquidating Movant's claim for purposes of this Chapter 11  
2 reorganization and save the bankruptcy court from doing the same.

3 **2. Relief Will Not Interfere with the Bankruptcy Case Nor Prejudice**

4 **Others.**

5 Regardless of whether the carrier defending the case ultimately should decline  
6 coverage, the state court proceeding can fix the amount of the Movant's claim for  
7 purposes of this Chapter 11.

8 The state court proceeding facilitates the Debtor's reorganization efforts. First, the  
9 claim can be liquidated in the state court proceeding, a venue that handles employment  
10 cases on a daily basis. Second, the Movant's claim is within the policy limits of Movant's  
11 asserted claim, and the Movant has agreed to be bound by the limits of the policy. This  
12 will not prejudice the claims or interests of the other creditors in the case.

13 **3. Debtor's Insurance Carrier has Assumed Defense of the Litigation.**

14 It is likely Debtor's insurance carrier will assume defense of the litigation given the  
15 nature of the claim.

16 **4. The Stay Should Be Lifted In the Interest of Judicial Economy.**

17 Debtor may attempt to argue that Ross's filing of her claim in this Court does not  
18 properly invoke her right to sue. While Ross would disagree, she nonetheless, intends to  
19 do everything necessary to preserve her claim, and doesn't want to respond to a "statute  
20 of limitation defense." The State Courts and district courts litigate employment disputes  
21 more frequently than the Bankruptcy Court so judicial economy would be promoted if the  
22 claim was liquidated in a non-bankruptcy venue.

23 **5. The "balance of hurt" weighs in favor of lifting the stay.**

24 If the motion is denied, then the Debtor's liability and the Movant's claim will have  
25 to be determined in this bankruptcy court. Movant will have to retain bankruptcy and  
26 Employment counsel and she has no funds to retain employment counsel at the present  
27 time.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CONCLUSION**

Based upon the factors set forth in this motion, the Movant requests that relief from the plan injunction and relief from automatic stay be granted so the Movant can proceed in state court on her pending wrongful termination case.

DATED: October 7, 2013

**HIGGINS LAW FIRM**

/s/ Gail J. Higgins  
Gail J. Higgins  
Bankruptcy Counsel for Leilani Ross,  
Creditor

**HIGGINS LAW FIRM**  
1017 N. La Cienega Blvd., Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

## **DECLARATION OF LEILANI ROSS**

**DECLARATION OF LEILANI ROSS**

I, Leilani Ross, declare and state as follows:

1. I am over the age of eighteen and a resident of Los Angeles County. I am a former employee of San Diego Hospice & Palliative Care Corporation ("**Debtor**") and I was terminated on May 17, 2010. The Equal Employment Opportunity Commission ("**EEOC**") issued a determination (the "**Determination**") providing: "that the evidence obtained in the [EEOC] investigation establishes reasonable cause to believe that Respondent subjected Charging Party [Movant] to disparate terms and conditions of employment based on her race, Black, in violation of Title VII of the Civil Rights Act of 1964. More specifically, Respondent engaged in an unlawful employment practice by denying Charging Party job assignments based on race pursuant to practice of accommodating a customer's preference for an assigned employee based on race." Exhibit "A" is a true and correct copy of the Determination.

2. The EEOC issued its Notice of Right ("**Notice**") to Sue on July 2, 2013, indicating that a suit must be filed within 90 days of Movant's receipt of the Notice. Exhibit "B" is a true and correct copy of the Notice. I received the Notice from the EEOC on July 16, 2013.

3. On September 12, 2013, I filed, in *pro per*, my objection to confirmation of Debtor's Plan and proof of claim with the Court, docketed as claim 237 on the Court's claim register. In the letter accompanying my objection, I outlined my struggles to retain counsel, and efforts to contact the Committee of Unsecured Creditors (the "**Committee**") and other attorneys representing parties in the case. I eventually made contact with Committee Counsel, Samuel Maizel, on September 19, 2013, and requested that the Committee stipulate to relief from stay. Mr. Maizel informed me that the Committee would consider the request, but that he would prefer I retained counsel. He said I should make attempts to retain counsel. I retained counsel on October 7, 2013.

4. Emergency Relief is essential to protect my rights as a creditor. As to certain of my claims, there is a four-year statute of limitation. As to other claims, I would

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

1 prefer to get them filed with a State or Federal Court prior to the expiration of the 90 day  
2 period. While I believe the fact the Bankruptcy Case was pending when the Notice was  
3 issued, that there has been an extension for filing claims agreed by Debtor and former  
4 employees, and circumstances after the Notice was rendered including the Committee's  
5 reluctance to stipulate to relief from stay unless I had counsel, constitute equitable tolling  
6 of my right to sue and/or that the filing of my claim with the Bankruptcy Court may satisfy  
7 my "claims made" suit requirement. I nonetheless seek emergency relief from stay and  
8 the Plan injunction so that I can formally file a complaint *on or before October 11, 2013*.  
9 This will assure my venue of choice and will allow me to comply with the EEOC's Notice,  
10 my other arguments notwithstanding. Therefore, I request a hearing on October 10,  
11 2013. An emergency hearing will protect against immediate and irreparable injury to me.

12 5. The Debtor San Diego Hospice & Palliative Care Corporation ("**Debtor**")  
13 filed its Chapter 11 petition with the Court on February 4, 2013. I was not scheduled in  
14 the case and am a former employee of the Debtor. On May 17, 2010, I was terminated  
15 from the Debtor's employ.

16 6. I intend to file a complaint based on wrongful termination, racial  
17 discrimination, and other violations of California employment law. A copy of the draft  
18 complaint is attached hereto as Exhibit "C". I am still in the process of editing this  
19 complaint with counsel, and reserve the right to add or delete allegations, but such is  
20 provided so the Court can understand the nature of my claim.

21 7. The Debtor's Disclosure Statement indicates there is an insurance policy  
22 with a policy limit of \$3.0 million dollars ("**Insurance Policy**"), a policy that likely covers  
23 my claim.

24 8. I am asking the Court to provide relief from the Plan injunction and to  
25 modify the automatic stay so that I may proceed to adjudicate my claims in the Superior  
26 Court and I will agree to limit my recovery to the limits of the Debtor's insurance policy. I  
27 have filed a proof of claim in the case for \$1,300,000.00, but this does not include all my  
28 claims, and my total claim may be more based on proof at trial [Claim 237].

1 I declare under penalty of perjury under the Laws of the United States that the  
2 foregoing is true and correct.

3 EXECUTED ON OCTOBER 7, 2013, AT EL CAJON, CALIFORNIA.

4   
5

6 Leilani Ross  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

0



## Exhibit A



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
San Diego Local Office

555 West Beech Street, Suite 504  
San Diego, CA 92101  
National Contact Center: (800) 669-4000  
National Contact Center TTY: (800) 669-6820  
San Diego Status Line: (866) 408-8075  
San Diego Direct Dial: (619) 557-7235  
TTY (619) 557-5748  
FAX (619) 557-7274

Charge No.: 488-2010-00734

Charging Party

Leilani Ross  
228 Roanoke Road  
El Cajon, CA 92020

Respondent

San Diego Hospice  
404 Camino del Rio South  
Suite 200  
San Diego, CA 92108

### **DETERMINATION**

Under the authority vested in me by the Equal Employment Opportunity Commission (EEOC), I issue the following determination as to the merits of the subject charge filed under the Title VII of the Civil Rights Act of 1964, as amended. All requirements for coverage have been met.

Charging Party alleged that she was subjected to Respondent's discriminatory employment practice by denying her job assignments based on her race, Black, pursuant to a practice of accommodating customer preference for non-Black Nurses (LVNs). Charging Party further alleged that she was discharged in retaliation for having complained about this discriminatory employment practice.

Respondent denies Charging Party's allegations.

I have determined that the evidence obtained in the investigation establishes reasonable cause to believe that Respondent subjected Charging Party to disparate terms and conditions of employment based on her race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended. More specifically, Respondent engaged in an unlawful employment practice by denying Charging Party job assignments based on race pursuant to a practice of accommodating a customer's preference for an assigned employee based on race.

No finding is made with respect to the retaliatory discharge allegation.

Respondent is reminded that Federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who have cooperated in Commission investigation is also prohibited. These protections apply regardless of the Commission's determination on the merits of the charge.

**LETTER OF DETERMINATION**  
**Leilani Ross v San Diego Hospice**  
**EEOC No.: 488-2010-00734**  
**Page 2 of 2 Pages**

Upon finding there is reasonable cause to believe that violations have occurred the Commission attempts to eliminate the alleged unlawful practices by informal methods of conference, conciliation and persuasion. Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. The confidentiality provisions of Section 107 of the Title VII and Commission Regulations apply to information obtained during conciliation.

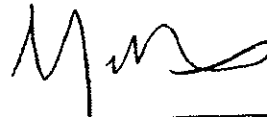
Where the Respondent declines to enter into settlement discussions or the Commission is unable to secure a settlement acceptable to the District Director, the Director shall so inform the parties in writing and advise them of the court enforcement alternative available to the EEOC.

A representative of the Commission will be in contact with you to determine your interest in participating in conciliation discussions.

On Behalf of the Commission:

3/13/13

Date



Marla Stern-Knowlton, Director  
San Diego Local Office

## Exhibit B



San Diego Local Office

555 W. Beech Street, Suite 504  
San Diego, CA 92101  
Intake Information Group: (800) 669-4000  
Intake Information Group TTY: (800) 669-6820  
San Diego Status Line: (866) 408-8075  
San Diego Direct Dial: (619) 557-7249  
TTY (619) 557-5748  
FAX (619) 557-7274  
Website: [www.eeoc.gov](http://www.eeoc.gov)

Ms. Leilani Ross  
228 Roanoke Road  
El Cajon, CA 92020

Re: Leilani L. Ross v. San Diego Hospice  
EEOC Charge No.: 488-2010-00734

Dear Ms. Ross:

The Equal Employment Opportunity Commission has determined that efforts to conciliate this charge as required under Title VII of the Civil Rights Act of 1964, as amended, have been unsuccessful. This letter constitutes the notice required by 1601.25 of the Equal Employment Opportunity Commission's Procedural Regulations which provides that the Commission shall notify the parties in writing when it determines that further conciliation efforts would be futile or non-productive.

No further efforts to conciliate this case will be made by the Equal Employment Opportunity Commission. The Commission has determined that it will not bring a lawsuit. The issuance of the enclosed Notice of Right to Sue concludes the processing of your charge by the Commission. If you decide to sue, you must file a complaint in Federal District Court within 90 days from the receipt of the Notice of Right to Sue.

On Behalf of the Commission

A handwritten signature in black ink, appearing to read "Marla B. Stern-Knowlton", is written over a horizontal line.

Marla B. Stern-Knowlton, Director  
San Diego Local Office

7/2/13

Date

cc:

Ms. Shauna L. Sinnott  
ANDREWS LAGASSE BRANCH & BELL LLP  
4365 Executive Drive, Ste. 950  
San Diego, CA 92121

**NOTICE OF RIGHT TO SUE**  
(CONCILIATION FAILURE)To: Leliani L. Ross  
228 Roanoke Road  
El Cajon, CA 92020From: San Diego Local Office  
555 W. Beech Street  
Suite 504  
San Diego, CA 92101On behalf of person(s) aggrieved whose identity is  
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
488-2010-00734	Marla B. Stern-Knowlton, Local Office Director	(619) 557-7284

**TO THE PERSON AGGRIEVED:**

This notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

**- NOTICE OF SUIT RIGHTS -**

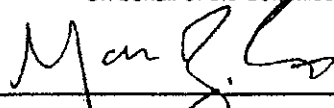
(See the additional information attached to this form.)

**Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act:** This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed **WITHIN 90 DAYS** of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

**Equal Pay Act (EPA):** EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred **more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

  
 Marla B. Stern-Knowlton,  
Local Office Director

7/2/13

Enclosures(s)

(Date Mailed)

CC: Dana Bryce  
Human Resources Director  
SAN DIEGO HOSPICE  
4311 3rd Avenue  
San Diego, CA 92103Ms. Shauna L. Sinnott  
ANDREWS LAGASSE BRANCH & BELL LLP  
4365 Executive Drive, Ste. 950  
San Diego, CA 92121

## Exhibit C

1 Gail J. Higgins (CA Bar No. 164989)  
ghigginse@aol.com  
2 **Higgins Law Firm**  
1017 N. La Cienega Blvd. Ste. 103  
3 West Hollywood, California 90069  
Telephone: 310.409.7080  
4 Facsimile: 310.388.1018

5 Counsel To Plaintiff  
Leilani Ross  
6

7  
8 **SUPERIOR COURT OF CALIFORNIA**  
9 **COUNTY OF SAN DIEGO**

10 In re  
11

12 LEILANI ROSS,

13 Plaintiff,

14 v.

15 SAN DIEGO HOSPICE & PALLIATIVE  
16 CARE CORPORATION, a California  
Corporation, SAN DIEGO HOSPICE  
17 FOUNDATION, Inc., a California  
Corporation, and DOES 1-10,

18 Defendants.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Case No.:

**PLAINTIFF LEILANI ROSS'S  
COMPLAINT FOR DAMAGES BASED  
ON:**

**(1) TITLE VII OF THE CIVIL RIGHTS ACT  
(2) 42 U.S.C. SECTION 1981**

**JURY TRIAL DEMANDED**



1 Plaintiff Leilani Ross ("**Ross**" or "**Plaintiff**"), by and through counsel, hereby files  
2 the following Complaint and Jury Demand ("**Complaint**").

3 **PRELIMINARY STATEMENT**

4 1. This is an action for an award of damages, punitive damages, attorneys'  
5 fees and other relief on behalf of former employee Plaintiff Leilani Ross against San  
6 Diego Hospice & Palliative Care, Corporation ("**SDHP**") and other defendants (the  
7 "**Defendants**"). Mrs. Ross has been harmed by the Defendant's race discrimination, and  
8 Defendant's retaliation for her complaints about race and age discrimination. This action  
9 arises under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act  
10 of 1991, 42 U.S.C. § 2000(e), et seq. ("**Title VII**"), the Civil Rights Act of 1866, as  
11 amended, 42 U.S.C. § 1981 ("**Section 1981**"), and the California Fair Employment and  
12 Housing Act et seq. ("**FEHA**").

13 **JURISDICTIONAL STATEMENT**

14 2. This Court has original jurisdiction of all civil actions arising under the  
15 Constitution, laws, or treaties of the United States pursuant to 28 U.S.C. §§ 1331 and  
16 1391.

17 3. The jurisdiction of this Court is also invoked pursuant to 28 U.S.C. §  
18 1343(4), which grants the District Court original jurisdiction in any civil action authorized  
19 by law to be commenced by any person to recover damages to secure equitable or other  
20 relief under any act of Congress providing for the protection of civil rights.

21 4. This Court has supplemental jurisdiction over California state law claims  
22 pursuant to 28 U.S.C. § 1367.

23 5. All conditions precedent to the institution of this suit have been fulfilled. On  
24 July 2, 2013, the United States Equal Employment Opportunity Commission ("**EEOC**")  
25 issued Notice of the Right to Sue to Plaintiff. Plaintiff received the Notice on July 16,  
26 2013. This action has been filed within 90 days of Plaintiff's receipt of said Notice. With  
27 respect to the FEHA claims herein, a Complaint in this matter was filed with the California  
28 Human Relations Commission more than one year ago.

**VENUE**

6. This action properly lies in the Southern District of California, pursuant to 29 U.S.C. § 1391(b) because the claim arose in this judicial district.

7. Venue in the Southern District of California is also authorized pursuant to 42 U.S.C. § 2000(e), et seq. 1.

**PARTIES**

8. Plaintiff Leilani Ross is a forty-one (41) year-old African-American female who resides in San Diego County.

9. Defendant SDHP was and is a corporation duly organized and existing under state law that acted as Plaintiff's employer that does significant business within the Commonwealth of California and is engaged in an industry affecting commerce.

10. SDHP is located at 4311 Third Avenue, San Diego, CA 92103, ("**San Diego Facility**").

11. At all times material hereto, Defendant SDHP employed more than five hundred individuals.

12. At all times material hereto, Defendant SDHP acted by and through its authorized agents, servants, workmen and/or employees acting within the course and scope of their employment with Defendant and in furtherance of Defendant's business.

13. At all times relevant hereto, Defendant SDHP acted as a "person" and "employer" within the meaning of one or more of the anti-discrimination laws at issue in this suit and is accordingly subject to the provisions of said laws. At all times relevant hereto, the San Diego Hospice Foundation, Corporation (the "**Foundation**") is liable for the allegations herein because Foundation was a joint employer with SDHP, operated an integrated enterprise with SDHP, there was an interrelation of operations between Foundation and SDHP, there was centralized control of labor relations between Foundation and SDHP, there was common management with SDHP and the Foundation, there was common ownership and financial control between SDHP and the Foundation.

1 As for the California claims, Plaintiff also asserts the Foundation and SDHP were alter  
2 egos, and alleges this for the purpose of this Complaint.

3 14. At all times relevant hereto, Plaintiff Leilani Ross was an "employee" of  
4 SDHP within the meaning of the anti-discrimination laws at issue in this suit and is  
5 accordingly entitled to the protections of said laws.

6 **FACTS**

7 15. Mrs. Ross began her employment with the Defendants when she was hired  
8 on or about June 9, 2009 as an nurse, in the crisis care unit.

9 16. At SDHP's San Diego facility, where Mrs. Ross was most recently  
10 employed, there is a culture of racial bias.

11 17. That SDHP fosters and approves of a racially biased atmosphere is  
12 supported by the fact that the overwhelming majority of its employees in its San Diego  
13 Facility are Caucasian.

14 18. During her employment, Mrs. Ross would receive unfavorable assignments,  
15 shifts, and tasks in the course of her employment. Defendants would change her  
16 assignments, shifts, and task, spontaneously and without explanation to Mrs. Ross.

17 19. On or about April of 2010, Ross learned of racially discriminatory policies  
18 and practices SDHP had enacted. Specifically, she was told by SDHP not to show up for  
19 a shift with no explanation. Defendants had a preference for "white" care providers and  
20 attendants. Mrs. Ross also learned from schedules of SDHP that one of the caucasian  
21 outpatients of SDHP advised SDHP, "don't send that ni&\*er here [for treatment]." On or  
22 about this same time, Ross learned that SDHP had created a physical ledger book and  
23 other practices, acts and procedures whereby the racial preference of patients for white  
24 caregivers was set forth for schedulers and other staff of SDHP. The purpose of this  
25 Book was to make sure African Americans were not assigned to certain shifts, tasks, and  
26 assignments based on the racial preference of the patient.

27 20. On or about May 3, 2010, Ross and a group of employees requested a  
28 meeting with supervisor Kimberly Sendra ("**Sendra**") to discuss and report the

1 Defendants' discriminatory practices. Carol Lovci intervened and advised Ross and other  
2 employees they should meet individually with management. Human resources of SDHP  
3 advised Ross and certain employees that a meeting would be held on May 11, 2010 to  
4 discuss the practices that Ross had reported to Ms. Sendra.

5 21. On May 11, 2010, Ross, caucasion co-employee Erica Cartier, African  
6 American Tracy McKay, hispanic co-employee Jennifer Leos, Sendra, and Human  
7 Resource Representative Attie Smith ("**Smith**"), and an additional employee participated  
8 in the meeting. During the meeting Sendra and Smith advised the employees including  
9 Ross, there was nothing Defendants could do about the racial preferences of patients for  
10 caucasion nurses, that Defendants had to assign tasks and shifts based on patient  
11 preferences, and that Defendants would take no action to alter the *status quo*.

12 22. On May 10, 2010 Ross reported her anxiety that the racial discrimination  
13 had caused, and SDHP's failure to address the discrimination.

14 23. SDHP responded with an email that it "didn't care" Ross was not feeling  
15 well, and that she was required to report to work. Ross presented Defendant's with a  
16 Doctor's note verifying her illness.

17 24. On May 17, 2010, Ross was terminated.

18 25. On June 10, 2010, Ross filed a claim with the Equal Employment  
19 Opportunity Commission, assigned charge number 488-2010-00734. On August 23,  
20 2010, SDHP claimed termination based on "misconduct related to most recent work" and  
21 appealed Ross' entitlement to unemployment benefits.

22 26. SDHP appealed UE benefits awarded to Ross. SDHP lost the appeal, and  
23 the panel affirmed Ross' right to UE benefits.

24 27. On March 13, 2013, The Equal Employment Opportunity Commission  
25 ("**EEOC**") issued a determination (the "**Determination**") providing: "that the evidence  
26 obtained in the [EEOC] investigation establishes reasonable cause to believe that  
27 Respondent subjected Charging Party [Movant] to disparate terms and conditions of  
28 employment based on her race, Black, in violation of Title VII of the Civil Rights Act of

1 1964. More specifically, Respondent engaged in an unlawful employment practice by  
2 denying Charging Party job assignments based on race pursuant to practice of  
3 accommodating a customer's preference for an assigned employee based on race." The  
4 right to sue letter is appended hereto as Exhibit "A".

5 28. During her employment with SDHP, Mrs. Ross performed her duties in  
6 a satisfactory and professional manner.

7 29. Despite her consistent performance, Mrs. Ross was targeted by SDHP,  
8 which displayed a bias toward Mrs. Ross on the basis of her race.

9 30. Ross was sent to the furthest locations away from her home based on her  
10 race, and the patient preferences for non- African American nurses.

11 31. That Mrs. Ross's race was considered by SDHP in subjecting Ms. Ross to  
12 unwarranted criticism and discipline, in failing to promote her or give her periodic raises  
13 despite her qualifications is evident from SDHP's actions.

14 32. Mrs. Ross was retaliated against by SDHP as a result of her complaints,  
15 both written and verbal, regarding discrimination and harassment.

16 33. In addition to the actions and inactions of SDHP alleged herein, SDHP's  
17 policies, practices, and customs have a disparate impact on African-American workers.

18 34. Specifically, SDHP's policies with respect to promotion and discipline have  
19 a disparate impact on African-American employees in that African-American employees  
20 at SDHP are routinely denied promotions for which Caucasian employees are selected  
21 and are subjected to more frequent and harsher discipline than their Caucasian  
22 colleagues.

23 35. Further, SDHP routinely ignores complaints of discriminatory conduct and  
24 fails to enforce anti-discrimination, anti-harassment, and/or anti-retaliation policies.

25 36. The treatment alleged herein that Mrs. Ross was subjected to by SDHP  
26 was motivated by discrimination on the basis of race, and in retaliation  
27 for Plaintiff's complaints about discrimination.  
28

1 37. SDHP discriminated against and harassed Mrs. Ross in violation of Title VII  
2 of the Civil Rights Act of 1964, the FEHA, and Section 1981.

3 38. Instead of appropriately investigating and addressing Plaintiff Leilani Ross's  
4 complaints of race discrimination and harassment, SDHP retaliated against Mrs. Ross in  
5 violation of Title VII of the Civil Rights Act of 1964, the FEHA, and Section 1981.

6 39. SDHP was aware of the discrimination, harassment, and retaliation suffered  
7 by Mrs. Ross, but failed to take any action to address the situation or prevent further  
8 discrimination, harassment, and retaliation.

9 40. SDHP has encouraged, tolerated, ratified and been deliberately indifferent  
10 to a series of actionable patterns, practices, and customs relating to training, supervision,  
11 investigation and discipline based on race.

12 41. As a result of the race, harassment, and retaliation suffered by Mrs. Ross,  
13 Mrs. Ross suffered, and continues to suffer severe emotional distress.

14 42. SDHP and its agents acted with the intent of causing, or in reckless  
15 disregard of the probability that their actions would cause Mrs. Ross severe emotional  
16 distress.

17 **COUNT I**

18 **(Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e))**

19 **(As Against All Defendants)**

20 43. Plaintiff Leilani Ross repeats and incorporates by reference the allegations  
21 of all previous paragraphs as fully as though the same were set forth at length herein.

22 44. Based on the foregoing, Defendant SDHP engaged in unlawful employment  
23 practices in violation of Title VII.

24 45. Title 2 of the CRA proscribes discrimination by a commercial entity yielding  
25 to the racial preferences of its customers. In discriminating against, harassing, and  
26 retaliating against Mrs. Ross because of her race and because of her complaints about  
27 race discrimination and harassment, Defendant SDHP violated Title VII of the Civil Rights  
28 Act of 1964.

1 46. Defendant's facially neutral policies, practices, and customs regarding  
2 promotions, discipline and the reporting and investigation of employee complaints of  
3 discrimination and harassment had a disparate impact on African-American employees in  
4 violation of Title VII.

5 47. Defendant's policies, practices, and customs of engaging in an unlawful  
6 employment practice by denying Mrs. Ross job assignments based on race pursuant to  
7 practice of accommodating a customer's preference for an assigned employee based on  
8 race had a disparate impact on African-American employees in violation of Title VII.

9 48. Said violations were intentional and willful.

10 49. Said violations warrant the imposition of punitive damages.

11 50. As the direct and proximate result of Defendant's violations of Title VII,  
12 Plaintiff Leilani Ross was wrongfully terminated from her employment, has sustained a  
13 loss of earnings, severe emotional and psychological distress, loss of self-esteem, loss of  
14 future earning power, as well as back pay, front pay, and interest due thereon along with  
15 and/or in addition to the damages and losses set forth herein.

16 51. Plaintiff Leilani Ross is now suffering and will continue to suffer irreparable  
17 harm and monetary damages as a result of Defendant's actions unless and until this  
18 Court grants the relief requested herein.

19 **COUNT II**

20 **(Civil Rights Act of 1866, 42 U.S.C. § 1981)**

21 **(As Against All Defendants)**

22 52. Plaintiff Leilani Ross repeats and incorporates by reference the allegations  
23 of all previous paragraphs as fully as though the same were set forth at length herein.

24 53. Based on the foregoing, Defendant SDHP has engaged in unlawful  
25 employment practices in violation of the Civil Rights Act of 1866, as amended, 42 U.S.C.  
26 § 1981.

27 54. In discriminating against, harassing and retaliating against Mrs. Ross  
28 because of her race and because of her complaints about race discrimination and



1 harassment, Defendant SDHP violated the Civil Rights Act of 1866, as amended, 42  
2 U.S.C. § 1981.

3 55. Said violations were intentional and willful.

4 56. Said violations warrant the imposition of punitive damages.

5 57. As the direct and proximate result of the Defendant's violation of Section  
6 1981, Plaintiff Leilani Ross was wrongfully terminated from her employment, has  
7 sustained a loss of earnings, severe emotional and psychological distress, loss of self-  
8 esteem, loss of future earning power, as well as back pay, front pay, and interest due  
9 thereon along with and/or in addition to the damages and losses set forth herein.

10 58. Plaintiff Leilani Ross is now suffering and will continue to suffer irreparable  
11 harm and monetary damages as a result of the Defendant's actions unless and  
12 until this Court grants the relief requested herein.

13 **PRAYER FOR RELIEF**

14 **WHEREFORE**, Plaintiff respectfully requests that this Court enter judgment in  
15 her favor and against Defendant SDHP:

16 a. Declaring that the acts and practices complained of herein violate Title  
17 VII;

18 b. Declaring that the acts and practices complained of herein violate Section  
19 1981;

20 c. Declaring that the acts and practices complained of herein violate the  
21 FEHA;

22 d. Awarding compensatory damages to Plaintiff Leilani Ross to make Plaintiff  
23 whole for all past and future lost earnings, benefits and earnings capacity which Plaintiff  
24 has suffered and will continue to suffer as a result of Defendant's conduct;

25 e. Awarding compensatory damages to Plaintiff Leilani Ross for past and future  
26 emotional upset, mental anguish, loss of reputation, humiliation, loss of life's pleasures  
27 and pain and suffering;

28 f. Awarding punitive damages to Plaintiff Leilani Ross;



1 g. Awarding liquidated damages to Plaintiff Leilani Ross;

2 h. Awarding Plaintiff Leilani Ross costs of this action together with her reasonable  
3 attorneys' fees;

4 i. Awarding Plaintiff Leilani Ross such other damages as are appropriate under  
5 Title VII, Section 1981, and the FEHA; and

6 j. Granting such other and further relief as this Court deems just and proper.  
7

8  
9 \_\_\_\_\_  
Gail J. Higgins (CA Bar No. 164989)

10 Counsel To Plaintiff  
11 *Leilani Ross*  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

HIGGINS LAW FIRM  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 FAX 310.388.1018

## **DECLARATION OF GAIL HIGGINS**

**DECLARATION OF GAIL J. HIGGINS**

I, Gail J. Higgins, declare and state as follows:

1. I am over the age of eighteen and my business address in West Hollywood, CA. I am bankruptcy counsel for Movant Leilani Ross.

2. I served the Motion For Emergency Relief From The Automatic Stay And Relief From the Plan Injunction by E-mail to counsel for Debtor and counsel to the Committee.

3. I do not anticipate any party-in-interest would oppose this Motion but for the Debtor and/or the Committee. Neither the Debtor, nor the Committee has indicated if it opposes the Motion.

4. Leilani Ross brings this Motion to protect her rights as a creditor, i.e. the 90 day right to sue period that is quickly approaching.

5. A copy of the slip opinion *In re HNRC Dissolution Co.*, Slip Opinion Case No. 03-14261 (Bank. E.D.K.Y 2006) (overruling liquidating trustee's objection to relief from the plan injunction and relief from stay) is appended hereto as Exhibit "D".

I declare under penalty of perjury under the Laws of the United States that the foregoing is true and correct.

EXECUTED ON OCTOBER 8, 2013, AT WEST HOLLYWOOD, CALIFORNIA.

/s/ Gail Higgins

Gail Higgins

## Exhibit D

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF KENTUCKY  
ASHLAND DIVISION**

**IN RE:**

**HNRC DISSOLUTION CO. CASE NO. 02-14261**

**DEBTOR**

**MEMORANDUM OPINION**

Several creditors of the former Debtors (collectively "the Movants") have petitioned the court for relief that will enable them to proceed with state court cases in which they seek insurance proceeds in actions for personal injury or wrongful death. They have filed the following pleadings seeking stay relief or injunctive relief:

1. Motion to Modify the § 362 Stay, filed by Barbara Boner ("Boner" and "Boner Motion");
2. Motion to Lift Stay and for Leave to Proceed to the Extent of Insurance Proceeds, filed by Brent Dotson ("Dotson" and "Dotson Motion");
3. Motion for Relief from the Automatic Stay and for Leave to Proceed to the Extent of Insurance Proceeds Under 11 U.S.C. § 362, filed by Gary and Debra Groves ("the Groveses" and "Groves Motion");
4. Motion to Modify Automatic Stay, filed by Lawrence Edmonds Jr. ("Edmonds" and "Edmonds Motion");
5. Motions for Relief from Plan Injunction to Permit Continuation of State Court Litigation Up to the Limits of Applicable Insurance Coverage, filed by Brenda Pack ("Pack" and "Pack Motion"), Chauncy Adams Jr. and others ("the Adams movants" and "Adams Motion"), and Randy Nichols ("Nichols" and "Nichols Motion").

The court heard these motions (collectively "the Motions") and the responses to them filed by Lexington Coal Company, LLC ("LCC") and the Liquidating Trustee on June 21, 2005 (the Nichols Motion) and July 15, 2005 (all other Motions), and took them under consideration for decision.

1. The Motions

All the Motions seek relief from one or more of the former Debtors. Boner seeks relief to allow her to proceed with a lawsuit in a pending West Virginia state court case involving a wrongful death claim in regard to her husband. One of the defendants in that suit, Cannelton, Inc., carried liability insurance that would cover the fatal injuries suffered by her husband. Boner further states that she will not pursue damages against Cannelton, Inc. in excess of its insurance coverage.

Dotson seeks to proceed with an action in Pike Circuit Court against Sunny Ridge Mining Company, Inc. and Sunny Ridge Enterprises, Inc., "to the extent of available insurance coverage." He states that he is willing to waive any claim he has or might have against LCC, the bankruptcy estate and the Liquidating Trust. The Groveses are parties to a civil action in the Circuit Court of Kanawha County, West Virginia against Evergreen Mining Company, et al. They state that they seek relief from the stay to "pursue their claims against the Debtors for the purpose of collecting the available insurance funds if liability is found."

Edmonds seeks relief from the stay for the purpose of allowing him to proceed against ECC Dissolution Company (f/k/a Eden Coal Company, f/k/a Bowie Resources Limited) "to the full extent of any liability insurance coverage available to compensate him for damages arising out of an injury" which occurred in August 2003 in one of the former Debtor's in Delta County, Colorado. Edmonds states that he will only seek to recover from the Debtor's liability insurance policies, or from employees or agents of the Debtor, and will take no action to recover against other assets of the Debtor's estate other than through the reorganization process and pursuant to the claims procedure established by the court.

Pack, Nichols, and the Adams movants seek relief from the Plan Injunction to permit continuation of their respective state court actions in Mingo County, West Virginia against Mountaineer Coal Development Company. Pack commenced her litigation for wrongful death, personal injury and related injuries regarding the injury and death of her husband, Nichols for personal injuries allegedly caused by the Debtor, and the Adams movants for nuisance and related tort injuries. Pack, Nichols, and the Adams movants all state that they do not seek to prosecute their state court actions in order to collect a judgment from any of the Debtors or their respective estates.

## 2. LCC's Response

LCC filed an Omnibus Objection to certain of the motions for stay relief set out above, and then filed a Supplement to its Omnibus Objection, Objection to Motion for Relief from Plan Injunction and Objection to Motion to Modify Automatic Stay by Lawrence Edmonds, Jr. ("the Supplement"). The Supplement concedes that the automatic stay is no longer in effect, citing Plans § 11.4 and Bankruptcy Code section 362(c)(2). LCC further filed an Objection to Motion for Relief from Plan Injunction to Permit

Continuation of State Court Litigation Up to the Limits of Applicable Insurance Coverage Filed by Brenda Pack and the same Objection in regard to the Adams movants. LCC appears to treat all the Motions before the court as motions for relief from the Plan Injunction.

LCC contends that granting relief from the Plan Injunction would negate its benefits for the Debtors' estates and the creditors, and that it would "amount[] to an end-run around the claims resolution procedures established in these cases." LCC also contends that the Plan Injunction prohibits the commencement or continuation ". . . . *in any manner* any action or other proceeding of any kind . . . . against the Debtors . . . ." Plans at § 11.3. LCC also cites language from Article 7 of the Plans: "On the effective date, all pre-petition lawsuits, litigation, administrative actions or other proceedings, judicial or administrative, against any of the Debtors, shall be dismissed as to the Debtors. Such dismissal shall be with prejudice to the assertion of a Claim against any of the Debtors other than by the timely filing of a proof of Claim." Sale Plan at § 7.7; Liquidating Plan at § 7.8. That section of Article 7 further provides that "[c]onfirmation of this Plan and entry of the Confirmation Order shall have no effect on any insurance coverages of the Debtors with respect to any Claim."

LCC characterizes the attempts of the Movants to obtain relief as attempts to modify the Plans solely for their own benefit, based on its contention that the Plan provisions it cites prohibit the Movants from proceeding with their state court actions. LCC argues that Bankruptcy Code section 1127(b) only allows post-confirmation plan modification prior to "substantial consummation" of the plan, and since the Plans herein are substantially consummated, the Movants cannot meet the section 1127(b) standard for plan modification.

LCC also argues that the Movants' requests for relief circumvent the claims resolution procedures established in the Plans. It points out that the claims resolution framework included deadlines for creditors of the Debtors' estates to file proofs of claim, and contends that the Movants had an obligation to timely file a proof of claim to preserve their right to pursue their claims against the Debtors. According to LCC, only Boner has filed claims in this proceeding, but contends that even her claims should not be liquidated in the context of the bankruptcy, and not in state court.

Finally, LCC argues that the Movants have no claim against an insurance company, but only a claim against a Debtor that might have entitlement to insurance coverage. LCC acknowledges that the

court could allow the requested relief and let the insurance carrier raise this point as a defense, but that the Debtors' creditors would be affected by such action as one of the Debtors' insurance carriers has filed a \$44 million administrative expense claim that might be based on costs incurred to defend such claims.

3. The Liquidating Trustee's response

The Liquidating Trustee filed an Omnibus Objection to Motions for Relief from Stay in regard to the Boner, Dotson, and Groves motions. He states at Paragraph 9 therein that "to the extent that the Plaintiffs are seeking relief from the automatic stay solely to pursue claims against an insurance policy, if any applies, and are waiving all claims against the Debtors' estates, then the Liquidating Trustee has no objection to relief from the automatic stay." The Liquidating Trustee is apparently only concerned with the possibility that the Movants might seek to assert unsecured claims against the Debtors' estates arising out of their respective state court actions. The Movants have all stated that they seek only to proceed against available insurance funds and not against any of the Debtors' estates, and such action is not at issue here.

4. Discussion

LCC bases its objections to the Motions on the language of the Plan Injunction which prohibits "commencing or continuing in any manner any action or other proceeding of any kind . . . . against the Debtors . . . ." Plans at § 11.3. LCC contends that this language prohibits the Movants from going forward with their state court actions. The Movants all contend, however, that they do not seek to recover from any of the Debtors, but only from any available insurance funds. As pointed out in memoranda attached to the Pack and Adams Motions, the applicable Debtor or Debtors are merely nominal parties in the state court actions for the purpose of establishing liability to permit payment up to the limits of applicable insurance. As stated by the court in *Doughty v. Holt (In re Doughty)*, 195 B.R. 1 (Bankr. D. Me. 1996), "[A]fter discharge and upon expiration of the automatic stay, actions aimed at collecting such an obligation from a debtor's liability insurer are permissible, even when they involve the debtor as a nominal defendant." *Id.* at 4.

LCC's arguments concerning the Movants' failure to file claims are addressed in *In re Coho*



*Resources, Inc.*, 345 F.3d 338 (5th Cir. 2003), in which the court considered a creditor's request for relief to recover from the debtor's liability insurer for personal injuries suffered while working on the debtor's property. The insurer asserted that the creditor was barred from proceeding against the debtor's insurers because he had failed to file a claim in the debtor's Chapter 11 case. The court stated:

We and other courts have squarely rejected [the insurer's] argument; it is entirely without merit. 11 U.S.C. § 524(a) operates as an injunction against actions against a *debtor* subsequent to the discharge of a debt. The bankruptcy discharge and § 524 injunction serve to give the *debtor* a financial fresh start. As a general rule, a creditor must file a proof of claim during the bankruptcy proceedings to preserve its claim against the *debtor*. If a creditor fails to file such notice, the § 524 injunction will act to shield the *debtor* from the creditor.

The discharge and injunction, however, are expressly designed to protect only the *debtor*, and do not affect the liability of any other entity for the debt. Accordingly, courts are in near unanimous agreement that § 524(e) permits a creditor to bring, and proceed in, an action nominally directed against a discharged debtor for the sole purpose of proving liability on its part as a prerequisite to recovering from its insurer. . . .

In short, even though [the creditor's] failure to file a proof of claim in [the debtor's] bankruptcy proceedings *is* a bar to continued prosecution of his claims against [the debtor], it does not affect his claims against non-debtors, such as general liability insurers. The fresh-start policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured.

*Id.* at 342-43 (internal quotations and citations omitted).

While the matter before the court involves an injunction written into the confirmed Chapter 11 Plans and not the section 524 injunction, the reasoning set out above is applicable here. The Plan Injunction is intended to protect the Debtors from attempts of all kinds to proceed against any and all of them; it is not intended to and does not protect third parties such as liability insurers. LCC argues that allowing the Movants to proceed with their state court actions will disrupt the claims resolution procedure established in the Plans and impermissibly modify the Plans. Its major concern, however, appears to be the effect of recovery by the Movants on the Debtors' liability insurers, especially one with a very large administrative expense claim pending in this case.

Further, while the Plan Injunction contains no provision akin to section 524(e) which provides in pertinent part that " . . . discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of another entity for, such debt[.]" the Plans do provide that "[c]onfirmation of this Plan and entry of the Confirmation Order shall have no effect on any insurance coverages of the Debtors with respect to any Claim." Sale Plan at § 7.7; Liquidating Plan at § 7.8. It is clear that both the language of

the Plan provisions and the case law support the position of the Movants. The court will therefore by separate order sustain the Motions and overrule LCC's objections. As set out above, the Liquidating Trustee's objection is effectively moot.

Copies to:

Dennis M. Ostrowski, Esq.  
Laura Day DelCotto, Esq.  
Rhonda Jennings Blackburn, Esq.  
Ellen Arvin Kennedy, Esq.  
John T. Hamilton, Esq.  
Spencer D. Elliott, Esq.  
Andrew D. Stosberg, Esq.  
Geoffrey S. Goodman, Esq.

1 Gail J. Higgins (CA Bar No. 164989)  
ghigginse@aol.com

2 **Higgins Law Firm**  
1017 N. La Cienega Blvd. Ste. 103  
3 West Hollywood, California 90069  
Telephone: 310.409.7080  
4 Facsimile: 310.388.1018

5 Bankruptcy Counsel for Leilani Ross  
6 Creditor

7 **UNITED STATES BANKRUPTCY COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 In re

Case No.: 13-01179-MM11

Chapter 11

10 SAN DIEGO HOSPICE & PALLIATIVE  
11 CARE CORPORATION,

**CERTIFICATE OF SERVICE**

12 Debtor and Debtor in  
13 Possession.

Date: [To Be Determined]  
Time: [To Be Determined]  
Courtroom: 1  
Room: 218  
Judge: Hon. Margaret M. Mann

17 I, Gail Higgins, declare that on October 8, 2013, I served the following document(s):

18 **EMERGENCY MOTION TO (1) MODIFY THE AUTOMATIC STAY TO LIQUIDATE**  
19 **CLAIM IN STATE COURT OR DISTRICT COURT AND (2) FOR RELIEF FROM PLAN**  
20 **INJUNCTION TO LIQUIDATE CLAIM IN STATE COURT OR DISTRICT COURT;**  
21 **DECLARATION OF LEILANI ROSS AND GAIL HIGGINS IN SUPPORT THEREOF**

22 in this action by CM/ECF notice of electronic filing by causing such document(s) listed  
23 above to be served through this Court's electronic transmission facilities via the Notice of  
24 Electronic Filing (NEF) and hyperlink, to the parties and/or counsel who are determined  
25 this date to be registered CM/ECF Users set forth below as identified on the service list  
26 obtained from this Court on the Electronic Mail Notice List.

27 I declare under penalty of perjury the foregoing is true and correct.

28 Dated: October 8, 2013

/s/ Gail Higgins

Gail Higgins

**HIGGINS LAW FIRM**  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

(Federal) BY CM/ECF NOTICE OF ELECTRONIC FILING by causing such document(s) listed above to be served through this Court's electronic transmission facilities via the Notice of Electronic Filing (NEF) and hyperlink, to the parties and/or counsel who are determined this date to be registered CM/ECF Users set forth in the service list obtained from this Court on the Electronic Mail Notice List.

Jeffrey Isaacs, Esq. [Jeffrey.isaacs@procopio.com](mailto:Jeffrey.isaacs@procopio.com)

Samuel R. Maizel, Esq. [smaizel@pszjlaw.com](mailto:smaizel@pszjlaw.com)

Haeji Hong - [Haeji.Hong@usdoj.gov](mailto:Haeji.Hong@usdoj.gov)  
Office of the US Trustee  
402 West Broadway, Suite 600  
San Diego, CA 92101  
Counsel for the United States Trustee

Request for Special Notice  
William R. Cumming -  
[cumming@cummingandassociateslaw.com](mailto:cumming@cummingandassociateslaw.com)  
CUMMING & ASSOCIATES, APC  
3080 Bristol Street, Sixth Floor, Suite 630  
Costa Mesa, CA 92626  
Counsel for Deliver-It

Request for Special Notice  
Matthew J. Troy  
UNITED STATES DEPARTMENT OF  
JUSTICE CIVIL DIVISION  
1100 L. Street, N.W.  
Room 10030  
Washington, DC 20530  
Counsel for the United States of America

Request for Special Notice  
Jeffrey D. Cawdrey  
GORDON & REES LLP  
101 West Broadway, Suite 2000  
San Diego, CA 92101  
Counsel for Scripps Health

Request for Special Notice  
Matthew J. Troy - [matthew.troy@usdoj.gov](mailto:matthew.troy@usdoj.gov)  
UNITED STATES DEPARTMENT OF

**HIGGINS LAW FIRM**  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

**HIGGINS LAW FIRM**  
1017 N. La Cienega Blvd., Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

- 1 JUSTICE CIVIL DIVISION
- 2 P.O. Box 875
- 3 Ben Franklin Station
- 4 Washington, DC 20044-0875
- 5 Counsel for the United States of America
- 6 Request for Special Notice
- 7 Amir Gamliel - AGamliel@perkinscoie.com
- 8 PERKINS COIE LLP
- 9 1888 Century Park East, Suite 1700
- 10 Los Angeles, CA 90067
- 11 Counsel for The Moyer Foundation
- 12 Request for Special Notice
- 13 John S. Kaplan - JKaplan@perkinscoie.com
- 14 PERKINS COIE LLP
- 15 1201 Third Avenue, 49th Floor
- 16 Seattle, WA 98101-3099
- 17 Counsel for The Moyer Foundation
- 18 Request for Special Notice
- 19 K. Kenneth Kotler - kotler@kenkotler.com
- 20 LAW OFFICES OF K. KENNETH KOTLER
- 21 1901 Avenue of the Stars, Suite 1100
- 22 Los Angeles, CA 90067
- 23 Request for Special Notice
- 24 Kristin Lamar –
- 25 attorney@newchapterlaw.com
- 26 NEW CHAPTER LAW GROUP
- 27 2121 Palomar Airport Road, Suite 110
- 28 Carlsbad, CA 92011
- 29 Counsel for EPLICA, INC.
- 30 Request for Special Notice
- 31 Martin W. Phillips
- 32 LAW OFFICES OF MARTIN W. PHILLIPS
- 33 8180 E. Kaiser Boulevard, Suite 100
- 34 Anaheim Hills, CA 92808
- 35 Counsel for Creditors, Covenant Care
- 36 Encinitas, LLC
- 37 Request for Special Notice
- 38 Gerald N. Sims - jerrs@psdslaw.com
- 39 Jennifer E. Duty – jduty@psdslaw.com
- 40 PYLE SIMS DUNCAN & STEVENSON
- 41 A Professional Corporation
- 42 401 “B” Street, Suite 1500

1 San Diego, CA 92101-4238  
2 Request for Special Notice  
3 Counsel for Creditor BETA Risk  
4 Management Authority  
5 Steven M. Berman – sberman@slk-law.com  
6 H.S. “Brad” deBeubien – bdebeaubien@slklaw.com  
7 SHUMAKER, LOOP & KENDRICK LLP  
8 Bank of America Plaza  
9 101 East Kennedy Boulevard  
10 Suite 2800  
11 Tampa, FL 33602  
12 Counsel for Cardinal Health 110, Inc.  
13 Request for Special Notice  
14 Christopher V. Hawkins  
15 SULLIVAN HILL LEWIN REZ & ENGEL  
16 550 West C Street, Ste. 1500  
17 San Diego, CA 92101  
18 Counsel for Connecticut General Life  
19 Insurance Company; CIGNA HealthCare of  
20 California, Inc., and related Cigna Dental  
21 entities  
22  
23  
24  
25  
26  
27  
28

**HIGGINS LAW FIRM**  
1017 N. La Cienega Blvd. Ste. 103  
West Hollywood, California 90069  
TEL 310.409.7080 • FAX 310.388.1018

# EXHIBIT 3

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LEILANI ROSS, an individual,

Plaintiff,

v.

SAN DIEGO HOSPICE &  
PALLIATIVE CARE CORPORATION,  
a California Corporation, SAN DEIGO  
HOSPICE FOUNDATION, a California  
Corporation RICHARD M.  
KIPPERMAN, in his capacity as  
liquidating trustee of the Liquidating  
Trust of San Diego Hospice & Pallative  
Care,

Defendants.

Civil No. 14cv2236 JAH (JMA)

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT [DOC. NO. 64]

BACKGROUND

Present before the Court is Defendants San Diego Hospice & Palliative Care's ("SDHP"), San Diego Hospice Foundation's ("SDHF"), and Richard M. Kipperman's<sup>1</sup> (collectively "Defendants") motion for summary judgment, or motion for partial summary judgment. The underlying claims were brought by a former employee, plaintiff Leilani Ross ("Plaintiff" or "Ross") based on allegations of unlawful employment discrimination, harassment, wrongful termination and retaliation in violation of Title VII, the Civil Rights Act of 1866, 42 U.S.C. § 1981, FEHA, and California Business & Professions Code.

<sup>1</sup> Due to bankruptcy proceedings, SDHP's assets are currently part of the liquidating trust of SDHP. In order to reach the trust assets, Plaintiff named the liquidating trustee, Richard Kipperman as a defendant. Plaintiff does not allege wrongful conduct against Mr. Kipperman.



1 1. Factual Background<sup>2</sup>

2 San Diego Hospice (“SDHP”) specialized in health care/support for the terminally  
3 ill. Plaintiff became a licensed vocational nurse (“LVN”) in 2006 and worked various jobs  
4 until she became a crisis care nurse at SDHP in May 2009. See Doc. No. 64-13. On her  
5 application, Plaintiff indicated she would accept the position and was willing to work any  
6 shift. Id. On June 2, 2009, Plaintiff accepted and signed SDHP’s offer of employment  
7 which acknowledged her at-will employment status and obligation to abide by SDHP  
8 policies and procedures. See Doc. Nos. 14, 16. Plaintiff worked three 12-hour shifts per  
9 week, 7 p.m. to 7 a.m. Doc. No. 64-6 at 52. Plaintiff was assigned to one in-home  
10 patient per shift, unless plaintiff was sent to another patient after the first died during her  
11 shift. Id. at 54.

12 When Plaintiff began working at SDHP in June 2009, she attended a two-day  
13 orientation where SDHP policies, such as non-discrimination, equal opportunity, and  
14 attendance policies, were reviewed. See Doc. Nos. 64-6 at 210-211, 64-9, 64-17, 64-18.  
15 Under the attendance policy, an employee would receive a written counseling after three  
16 “occurrences,” a final warning after four occurrences, and termination after five  
17 occurrences. See Doc. No. 64-19. An “occurrence” is a non-consecutive unscheduled  
18 absence, e.g. if an employee called off three days in a row for the same illness, it would be  
19 considered a single occurrence. Doc. Nos. 64-9 at 84, 64-10 at 58. However, if an  
20 employee called off one day, worked one day, and the called off again, this would count  
21 as two occurrences. The occurrences were evaluated on a six-month rolling period. Doc.  
22 Nos. 64-6 at 211, 64-9 at 109-110, 64-19. On February 24, 2010, Plaintiff received a  
23 written counseling after she accrued six occurrences, or eight absences, during the previous  
24 three months. Doc. No. 64-20. Plaintiff acknowledged, in writing, that she understood  
25 the ramifications of her repeated absences and stated she would make efforts to improve  
26 her attendance in order to reduce impact on the department. Id.

27  
28 <sup>2</sup> These background facts have been taken from the parties’ briefs and are largely undisputed. Any  
material facts in dispute are discussed later.

1 In March of 2010, Kimberly Sendra became plaintiff's supervisor. See Doc. No.  
2 44, Exh. 38. Around the time Sendra became Plaintiff's supervisor, Plaintiff heard from  
3 other employees (Shaneda Lybert and Tracy McKay) that Sendra was racist and SDHP  
4 fostered a culture of racism. Doc. No. 68-2 at ¶ 10. Plaintiff heard three patients make  
5 derogatory remarks against her on account of her race. Doc. No. 64-6 at 66. Plaintiff  
6 viewed a note on SDHP's nursing software expressing that one of plaintiff's patients  
7 and/or their family "requests no African-American staff." Id. at 71. Plaintiff was not  
8 assigned to that patient any further. Doc. 68-2 at ¶ 11.

9 On April 8, 2010, plaintiff received a final written warning about her absences after  
10 she called off all of her shifts for a week. Doc. No. 64-21. Plaintiff was told this was her  
11 final warning which explained that any further occurrences would lead to her termination,  
12 and Plaintiff acknowledged the warning in writing. Id. On May 5, 2010, Plaintiff applied  
13 for a transfer to another department in SDHP, but her request was denied as she was not  
14 eligible for transfer while on a final written warning. See Doc. Nos. 64-6 at 135-136, 231,  
15 64-7 at 199, 255-254, 64-27. Nevertheless, Plaintiff called off the night of May 10, 2010  
16 despite knowing the consequences of another unscheduled absence. Doc. No. 64-22.  
17 Plaintiff admits this was an unscheduled absence and that she exceeded the number of  
18 absences allowed under SDHP's policy. See Doc. No. 64-6 at 145-146, 155, 228.  
19 Plaintiff also admits that her absence would have been counted as an occurrence under the  
20 policy even if she submitted a doctor's note. Doc. No. 64-6 at 150.

21 Due to Plaintiff's absence after receipt of her final warning, Ms. Sendra decided to  
22 terminate Plaintiff and began preparing such paperwork on the evening of May 10, 2010.  
23 Doc. Nos. 64-7 at 51, 171, 241, 64-23. The next day, Sendra met with Addie Smith of  
24 SDHP's Human Resources department to discuss Plaintiff's termination at 10 a.m. Doc.  
25 No. 64-8 at 42-43. When Sendra explained her reasons for terminating Plaintiff, Smith  
26 stated plaintiff would not be terminated until after a previously scheduled staff meeting  
27 because Smith needed to review the paperwork and prepare plaintiff's final paycheck first.  
28 Id. at 263.

1 On May 11, 2010, after Plaintiff obtained a doctor's note with intention to take  
2 a leave of absence until May 17, 2010, she attended a staff meeting and complained that  
3 she experienced race discrimination while working for SDHP. See Doc. Nos. 64-6 at 90-  
4 91, 64-8 at 240. Plaintiff's complaints were not included in her employment file as none  
5 of the comments from the May 11th meeting were recorded. Id. Plaintiff's leave request  
6 was granted, so Sendra and Smith decided to wait until plaintiff's return to terminate her.  
7 Doc. No. 64-8 at 257. Plaintiff attempted to extend her leave but her request was denied.  
8 See Doc. Nos. 64-7 at 161, 64-26. On May 17, 2010, Smith and Sendra asked to meet  
9 with Plaintiff and notified her she was being terminated for excessive absenteeism. Doc.  
10 No. 64-6 at 152. Plaintiff admits the number of her pre-leave absences violated SDHP's  
11 attendance policy. Id. at 162. Sendra and Smith both testified they have terminated  
12 other employees for violating SDHP's attendance policy. Doc. Nos. 64-7 at 286-287,  
13 288-290, 64-8 at 85-86.

14 2. Procedural History

15 The instant complaint was filed in San Diego Superior Court on May 14, 2014.  
16 Doc. No. 1-3. On September 19, 2014, a notice of removal was filed in this Court. Doc.  
17 No. 1. Defendants answered the complaint on January 21, 2015. Doc. No. 17. On  
18 January 29, 2016, the Defendants filed its motion for summary judgment, or, in the  
19 alternative, motion for partial summary judgment. Doc. No. 64. On March 28, 2016,  
20 Plaintiff filed her response in opposition to defendant's motion. Doc. No. 68. On April  
21 4, 2016, Defendants filed its reply in support of its motion for summary judgment. Doc.  
22 No. 70.

23 DISCUSSION

24 1. Legal Standard

25 Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil  
26 Procedure where the moving party demonstrates the absence of a genuine issue of material  
27 fact and entitlement to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp.  
28 v. Catrett, 477 U.S. 317, 322 (1986). A fact is material when, under the governing  
substantive law, it could affect the outcome of the case. See Anderson v. Liberty Lobby,

1 Inc., 477 U.S. 242, 248 (1986); Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997).  
2 A dispute about a material fact is genuine if “the evidence is such that a reasonable jury  
3 could return a verdict for the nonmoving party.” Anderson, 477 U.S. at 248.

4 A party seeking summary judgment always bears the initial burden of establishing  
5 the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. The moving  
6 party may satisfy this burden in two ways: (1) by presenting evidence that negates an  
7 essential element of the nonmoving party’s case or (2) by demonstrating that the  
8 nonmoving party failed to make a showing sufficient to establish an element essential to  
9 that party’s case on which that party will bear the burden of proof at trial. Id. at 322-23.  
10 Where the party moving for summary judgment does not bear the burden of proof at trial,  
11 it may show that no genuine issue of material fact exists by demonstrating that “there is  
12 an absence of evidence to support the non-moving party’s case.” Id. at 325. The moving  
13 party is not required to produce evidence showing the absence of a genuine issue of  
14 material fact, nor is it required to offer evidence negating the moving party’s claim. Lujan  
15 v. National Wildlife Fed’n, 497 U.S. 871, 885 (1990); United Steelworkers v. Phelps  
16 Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989). “Rather, the motion may, and  
17 should, be granted so long as whatever is before the District Court demonstrates that the  
18 standard for the entry of judgment, as set forth in Rule 56(c), is satisfied.” Lujan, 497  
19 U.S. at 885 (quoting Celotex, 477 U.S. at 323). “Disputes over irrelevant or unnecessary  
20 facts will not preclude a grant of summary judgment.” T.W. Elec. Serv., Inc. v. Pacific  
21 Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987).

22 “The district court may limit its review to the documents submitted for purpose of  
23 summary judgment and those parts of the record specifically referenced therein.” Carmen  
24 v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the  
25 court is not obligated “to scour the record in search of a genuine issue of triable fact.”  
26 Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing Richards v. Combined Ins.  
27 Co., 55 F.3d 247, 251 (7th Cir. 1995)). If the moving party fails to discharge this initial  
28 burden, summary judgment must be denied and the court need not consider the

1 nonmoving party's evidence. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60  
2 (1970).

3 If the moving party meets the initial burden, the nonmoving party cannot defeat  
4 summary judgment merely by demonstrating "that there is some metaphysical doubt as  
5 to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S.  
6 574, 586 (1986); see also Anderson, 477 U.S. at 252 ("The mere existence of a scintilla  
7 of evidence in support of the nonmoving party's position is not sufficient."). Rather, the  
8 nonmoving party must "go beyond the pleadings and by her own affidavits, or by the  
9 depositions, answers to interrogatories, and admissions on file, designate specific facts  
10 showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324 (quoting  
11 Fed.R.Civ.P. 56(e)) (internal quotations omitted).

12 When making this determination, the court must view all inferences drawn from  
13 the underlying facts in the light most favorable to the nonmoving party. See Matsushita,  
14 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing  
15 of legitimate inferences from the facts are jury functions, not those of a judge, [when] he  
16 [or she] is ruling on a motion for summary judgment." Anderson, 477 U.S. at 255.

17 The Ninth Circuit has previously acknowledged that declarations are often self-  
18 serving because the party submitting it would use the declaration to support his or her  
19 position. S.E.C. v. Phan, 500 F.3d 895, 909 (9th Cir. 2007) (holding that the district  
20 court erred in disregarding declarations as "uncorroborated and self-serving"). Although  
21 the source of the evidence may have some bearing on its credibility and on the weight it  
22 may be given by a trier of fact, the district court may not disregard a piece of evidence at  
23 the summary judgment stage solely based on its self-serving nature. See id. However, a  
24 self-serving declaration that states only conclusions and not facts that would be admissible  
25 evidence will not be considered. See id.; see also Villiarimo v. Aloha Island Air, Inc., 281  
26 F.3d 1054, 1059 n. 5, 1061 (9th Cir. 2002) (holding that the district court properly  
27 disregarded the declaration that included facts beyond the declarant's personal knowledge  
28 and did not indicate how she knew the facts to be true); F.T.C. v. Publ'g Clearing House,

1 Inc., 104 F.3d 1168, 1171 (9th Cir. 1997) (“A conclusory, self-serving affidavit, lacking  
2 detailed facts and any supporting evidence, is insufficient to create a genuine issue of  
3 material fact.”).

#### 4 ANALYSIS

5 This instant complaint alleges eight causes of action against defendants: (1) race  
6 discrimination in violation of Title VII; (2) race discrimination in violation of 42 U.S.C.  
7 §1981; (3) two claims alleging discrimination on the bases of race, ancestry, national  
8 origin in violation of FEHA; (4) retaliation in violation of FEHA; (6) failure to prevent  
9 discrimination and harassment in violation of FEHA; (7) wrongful termination in violation  
10 of public policy; and (8) violations of the unfair competition law. Doc. No. 1-4.

11 Defendants move for summary judgment as to all causes of action, in several  
12 permutations, on the following grounds: (a) Plaintiff cannot establish that similarly  
13 situated employees outside her protected class were treated more favorably; (b) Plaintiff  
14 cannot establish an actionable adverse employment action related to her work  
15 assignments; (c) Plaintiff cannot establish that the legitimate reason for her termination  
16 is pretext for unlawful race discrimination; (d) Plaintiff cannot establish a retaliatory  
17 causal link between her complaint and her termination; (e) Plaintiff cannot establish the  
18 legitimate reason for her reason for her termination is pretext for unlawful retaliation; (f)  
19 Plaintiff failed to timely exhaust her administrative remedies on her first and fourth claim;  
20 (g) Defendant’s conduct is not sufficiently severe and pervasive to the level of actionable  
21 harassment; (h) Plaintiff cannot establish actionable discrimination, retaliation, and  
22 harassment; and (i) plaintiff cannot establish she was performing her job satisfactorily at  
23 the time of her termination. See Doc. No. 64.

#### 24 A. San Diego Hospice Foundation

25 Defendants contend that Plaintiff cannot establish a claim against San Diego  
26 Hospice Foundation (“SDHF” or the “Foundation”). Doc. No. 64-1 at 23-25.  
27 Specifically, Defendants assert that Plaintiff cannot produce sufficient evidence to  
28 establish SDHF is liable for the alleged discrimination or retaliation as either a joint



1 employer or an alter ego of SDHP. Id.

2 Plaintiff argues that SDHF is a joint employer, integrated enterprise, or alter ego  
3 of SDHP and SDHF is liable for SDHP's conduct. Doc. No. 68-1 at 24-25. Specifically,  
4 Plaintiff spells out numerous factors the Court should consider in order to find SDHF  
5 operates as an integrated enterprise with SDHP.

6 In reply, SDHP opposes that plaintiff produced sufficient evidence to establish  
7 SDHF is liable for the conduct of SDHP. Doc. No. 70 at 9-10. Specifically, Defendant  
8 points out that Plaintiff does not offer any evidence to show that SDHF controlled the  
9 day-to-day employment decisions of SDHP, SDHF ever exercised any control over  
10 plaintiff's work or worksite, or satisfies any elements of alter ego.

11 A worker may be employed by more than one employer where each employer  
12 supervised the worker, had the power to hire, fire, or discipline the worker and supervised,  
13 monitored, or controlled the employee and her work site. E.E.O.C. v. PMA, 351 F.3d  
14 1270, 1275 (9th Cir. 2003). Where a company and a related business "operate as an  
15 integrated enterprise," the related business is liable for discrimination. Morgan v. Safeway  
16 Stores, Inc., 884 F.2d 1211, 1214 (9th Cir. 1989). In determining whether an "integrated  
17 enterprise" exists, courts focus on the following factors: (a) interrelation of operations; (b)  
18 centralized control of labor relations; (c) common management; and (d) common  
19 ownership or financial control. Kang v. U. Lim America, Inc., 296 F.3d 810, 815 (9th Cir.  
20 2002). The alter ego doctrine is implicated when (1) unity of interest or ownership  
21 between the individual and the corporation is such that the separate personalities of each  
22 no longer exists, and (2) an unjust or inequitable result will follow if the subject acts are  
23 treated as those of the corporation alone. Sonora Diamond Corp. v. Sup. Ct., 83  
24 Cal.App.4th 523, 538-539 (2000). Courts consider factors such as identical equitable  
25 ownership, inadequate capitalization at formation, disregard of corporate formalities, lack  
26 of segregation or corporate records, and identical directors and officers, among others. Id.  
27 Difficulty in enforcing a judgment or collecting a debt does not constitute "injustice" for  
28 the alter ego doctrine. Id. at 539.

1 The Court finds the evidence supports a finding that SDHF and SDHP were joint  
2 employers over Plaintiff. The same individuals are members of both the SDHP board and  
3 the SDHF board. SDHP admits a unity of identity of officers and directors between  
4 SDHP and SDHF existed at relevant times, and SDHP admits there was a lack of  
5 apparent or substantive distinction between the operation of SDHP and SDHF.  
6 Importantly, SDHP and SDHF shared Human Resources personnel, so SDHF's interests  
7 were naturally encompassed in SDHP's employment decisions. New staff members of  
8 both SDHP and SDHF attended the same orientation. On these grounds, Plaintiff has  
9 demonstrated a centralized control of labor relations between SDHP and SDHF beyond  
10 mere common use of SDHP's offices and equipment in 2009-2010.

11 Additionally, SDHP held donations earmarked for SDHF. SDHP provided goods  
12 and services to SDHF while Plaintiff was employed by SDHP prior to its bankruptcy.  
13 SDHP used interest earned on money held by SDHF to subsidize SDHP expenses.  
14 According to a former CEO of SDHP, SDHP paid the wages of the employees of SDHF.  
15 The expenses of both SDHP and SDHF were paid by SDHP. SDHP and SDHF share the  
16 same investment firm, website, vendors, and insurers. Furthermore, SDHF grants were  
17 received by SDHP. SDHP guaranteed debts for gifts made by benefactors of SDHF.

18 The Court finds an interrelation of operations existed between SDHP and SDHF  
19 such that knowledge of employment decisions made by SDHP can be imputed to SDHF.  
20 *Williams v. Grimes Aerospace Co.*, 988 F.Supp. 925, 937 (D. S.C. 1997). For that reason,  
21 the Court DENIES Defendant's motion for summary judgment as Plaintiff presents  
22 sufficient evidence to demonstrate a genuine issue of material fact as to whether SDHF  
23 should be held liable as a joint employer.

24 B. Race Discrimination

25 Defendants contend that Plaintiff cannot establish a prima facie case of  
26 discrimination. Doc. 64-1 at 14. Specifically, Defendants argue that Plaintiff's  
27 discrimination claims fails because Plaintiff's admitted absences prevent her from  
28 establishing satisfactory performance. *Id.* at 14-15. Also, Defendants assert Plaintiff



1 cannot establish that similarly situated employees outside of Plaintiff's protected class  
2 were treated favorably. *Id.* at 15. In addition, Defendants argue they had a legitimate,  
3 non-discriminatory reason for its actions, Plaintiff's violation of the attendance policy.  
4 *Id.* at 16. Defendants also argue that Plaintiff cannot establish that the legitimate reason  
5 Defendants propose is pretext for race discrimination. *Id.* at 18.

6 Plaintiff relies on *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495 (9th Cir. 2015) in  
7 arguing that merely Plaintiff's declaration and deposition testimony are sufficient enough  
8 to survive summary judgment scrutiny. Doc. No. 68-1 at 15-16. Plaintiff contends she  
9 can produce evidence showing her termination was motivated, at least in part, by race.  
10 *Id.* at 16-17. Plaintiff also argues that she established a *prima facie* case for discrimination  
11 in that (1) Plaintiff is a member of a protected class, African American; (2) she was  
12 qualified for her job, had good performance, and was liked by her peers and patients; (3)  
13 her allegations of denial of shifts and termination establish an adverse employment action;  
14 and (4) "a significant list of facts (as stated above) and the [Plaintiff's declaration] reflect  
15 actions" were taken with a discriminatory motive. *Id.* at 17. Plaintiff contends her  
16 allegations of discrimination are sufficient in demonstrating that excessive absences were  
17 a pretext for race discrimination. In addition, Plaintiff argues the timing of Plaintiff's  
18 termination, her strong job performance, Defendants' departure from normal termination  
19 procedures under the attendance policy all highlight pretext for race discrimination. *Id.*  
20 at 18-19.

21 In reply, Defendants point out that Plaintiff's subjective belief of her competence  
22 cannot defeat summary judgment. Also, Defendants argue that Plaintiff simply ignores  
23 her failure to comply with her duty to comply with SDHP's attendance policy and her  
24 express admission to violating the attendance policy after being counseled several times  
25 about excessive absenteeism. Doc. No. 70 at 1 (citing Doc. No. 64-6 at 241). Defendants  
26 assert that it is undisputed that Sendra and Smith have terminated non-African American  
27 employees for violating SDHP's attendance policy. Defendants contend that Plaintiff  
28 only relies on inadmissible, prior hearsay statements made by Damiana Lawrence, whose

1 testimony in this case does not support Plaintiff's contentions. Id. at 2-3. In addition,  
2 Defendants argue Plaintiff failed to establish SDHP's reasons for terminating her were  
3 pretext for race discrimination.

4 To establish a prima facie claim for race discrimination, a plaintiff must prove that:  
5 (1) she is a member of a protected group; (2) she was performing her job satisfactorily; (3)  
6 she was subjected to an adverse employment action; and (4) similarly situated employees  
7 outside her protected class were treated more favorably. McDonnell Douglas Corp. v.  
8 Green, 411 U.S. 792, 802 (1973). To be deemed similarly situated, for the purposes of  
9 a Title VII discrimination claim, the individuals with whom the plaintiff seeks to compare  
10 his/her treatment must have dealt with the same supervisor, have been subject to the same  
11 standards, and have engaged in the same conduct without such mitigating circumstances  
12 that would distinguish their conduct or the employer's treatment of them for it. Anderson  
13 v. City and Cty. Of San Francisco, 2016 WL 946171 at \*14 (N.D. Cal. 2016).

14 As an initial matter, it is agreed that Plaintiff is a member of a protected class as an  
15 African American. The Court finds that Plaintiff's admission that she repeatedly violated  
16 the SDHP attendance policy, beyond the allowable limit, prevents her from establishing  
17 she performed her job satisfactorily and a prima facie case of discrimination. Each new  
18 employee acknowledged they would abide according to the policies and procedures set by  
19 SDHP, including the attendance policy, during new employee orientation. Plaintiff's  
20 receipt of written counseling after having six occurrences (eight absences) in a three-month  
21 period put her on notice that she was not performing her job satisfactorily. Plaintiff  
22 acknowledged her receipt of the written counseling and stated she would improve her  
23 attendance to reduce negative impact on the department. Plaintiff also received a final  
24 warning before her termination cautioning her that any more unscheduled absences would  
25 subject Plaintiff to immediate termination. Accordingly, SDHP's written warnings of  
26 Plaintiff's excessive absences and her acknowledgment of the impact her excessive absences  
27 had on the department prevent Plaintiff from proving she performed her job satisfactorily.

28 Plaintiff was subject to an adverse employment action when she was terminated by

SDHP. Yet, Plaintiff does not highlight other incidents where she was subjected to an adverse employment action on account of her race. Granted, on April 25, 2010, Plaintiff was not assigned a patient on one occasion due to an administrative error and plaintiff saw a note in which a patient's family stated it did not want African American nurses. Plaintiff asserts that SDHP scheduler Damiana Lawrence advised her that SDHP had a policy to accommodate patients' race-preference requests which caused African American nurses to be scheduled last. Doc. No. 68-2 at 5 ¶ 13. However, Lawrence testified that she was not aware of a patient requesting a caregiver based on race, and she never scheduled a nurse based on a patient's racial preference. Doc. No. 70-7 at 3. Despite enduring a day where she was not assigned a patient and reading a discriminatory note, the Court finds Plaintiff's termination was the only adverse employment action she suffered.

In her opposition, Plaintiff does not put forth any examples of any similarly situated non-African Americans with compounding call-off "occurrences" who somehow were not fired. It is unclear what evidence Plaintiff relies on to prove non-African American employees were treated more favorably. Accordingly, the Court finds Plaintiff has not demonstrated specific nor substantial evidence that similarly situated employees outside the protected class were treated more favorably.

Although Plaintiff's burden of presentation is low at this point of the litigation, Plaintiff's admissions about her absences corroborate the legitimate, non-discriminatory reason given by Defendants for terminating Plaintiff. Plaintiff does not rebut SDHP's ability to exercise its right to make a business decision, which permissibly can be foolish, trivial, or baseless, as long if it honestly believes in its reason for termination. See *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002). Plaintiff has not shown that SDHP did not honestly believe its proffered reasons for disciplining her. *Id.*; *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028-29 n. 6 (9th Cir. 2006). Since Plaintiff concedes of her absenteeism and lacks evidence showing a difference in treatment among non-protected class members with excessive absences, Plaintiff is

1 foreclosed from making a prima facie case of race discrimination. Therefore, the Court  
2 GRANTS Defendant's motion for summary judgment as to the race discrimination claims.

3 C. Retaliation

4 Defendants argue that Plaintiff similarly cannot establish a prima facie case for  
5 retaliation because she cannot establish a causal link between her complaints and  
6 termination. Doc. No. 64-1 at 19-20. Specifically, Defendants assert Plaintiff's claim fails  
7 because she admits to engaging in the conduct which led to her termination, absteemism,  
8 and the decision to fire Plaintiff was made before decision makers had knowledge of her  
9 discrimination complaints. Id. at 20.

10 Plaintiff argues she established FEHA retaliation as she engaged in statutorily  
11 protected activity by complaining about the policy of accommodating a customer's  
12 preference for a non-minority caregiver. Doc. No. 68-1 at 21. Plaintiff contends her claim  
13 is proven in that she was fired after complaining of race discrimination and the timing  
14 shows the causal connection. Id. at 22.

15 In reply, Defendants argue that Plaintiff does not dispute that Sendra decided to  
16 terminate her and notified HR of the decision before the May 11 meeting. Doc. No. 70  
17 at 6. Smith, the HR personnel Sendra notified, testified that HR's role was simply to  
18 ensure all the paperwork was submitted in support of the termination and the delay in  
19 terminating plaintiff was merely formality to get Plaintiff's exit paperwork ready. See Doc.  
20 No. 64-10 at 41-42 (Smith Deposition). Defendants assert that timing alone cannot  
21 establish pretext. Loggins v. Kaiser Permanente Int'l, 151 Cal.App.4th 1102, 1112-1113  
22 (2007).

23 In a Title VII unlawful retaliation claim, a plaintiff must first establish a prima facie  
24 case of retaliation by showing she (1) engaged in protective activity, (2) was thereafter  
25 subjected to adverse employment action, and (3) that causal link existed between the two.  
26 Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982). An employee's formal or  
27 informal complaints to a supervisor regarding unlawful discrimination is a "protected  
28 activity" and adverse actions taken against the employee after such complaints may

1 constitute retaliation. *Washington v. California City Correction Ctr.*, 871 F.Supp.2d  
2 1010, 1028 (E.D. Cal. 2012); see *California Fair Emp't and Hous. Comm'n v. Gemini*  
3 *Aluminum Corp.*, 122 Cal.App.4th 1004, 1018 (2004) (finding "informal complaints to  
4 management about discriminatory employment practices are considered sufficient  
5 opposition to trigger the prohibition against retaliation"). To show a casual link between  
6 protected activity and retaliation by an employer, plaintiff must present evidence  
7 sufficient to raise an inference that her protected activity was a likely reason for adverse  
8 action and essential to the causal link determination is the employer's awareness of  
9 Plaintiff's protected activity. *Cohen*, 686 F.2d at 797. However, when an employer  
10 makes an employment decision before being aware of an employee's engagement in  
11 protected activity, the causal link between the decision and protected activity is broken.  
12 See *Cohen*, 686 F.2d at 797.

13       The Court finds that Plaintiff did not engage in protected activity until she  
14 complained of racially discriminatory treatment at the May 11<sup>th</sup> meeting. Plaintiff  
15 however never reported claims of race discrimination directly to her supervisor or Human  
16 Resources personnel before that date. Plaintiff's complaints lodged during the May 11<sup>th</sup>  
17 meeting constitute protected activity because Plaintiff informally yet directly complained  
18 of unlawful race discrimination to her supervisor involved. Kimberly Sendra, Plaintiff's  
19 supervisor, recalled hearing of Plaintiff's complaints of race discrimination through  
20 another employee but was unclear about when Plaintiff's complaints began. The Court  
21 will not construe disgruntled rumblings amongst coworkers as protected activity under  
22 FEHA analysis as no complaint, formal or informal, was made directly to a supervisor.  
23 Plaintiff undoubtedly suffered an adverse employment action when she was terminated  
24 from SDHP for excessive absenteeism. However, Plaintiff has not provided a causal link  
25 between her informal complaints at the staff meeting and her termination.

26       Plaintiff points out the time and manner of her termination suggests retaliation on  
27 the part of SDHP. Specifically, Plaintiff argues that terminating her six days after the  
28 May, 11, 2010 meeting without executive approval for her termination is indicative of

1 unlawful retaliation. Plaintiff contends her termination for excessive absenteeism was  
2 merely pretext for unlawful retaliation. Nonetheless, the attendance policy states an  
3 employee may be terminated for excessive absences and/or attendance patterns that  
4 negatively impact operations of the department...” Ms. Bryce testified there was no  
5 requirement a VP approve a termination and the disciplinary form should be modified to  
6 signify “or” rather than “and.” In fact, Carol Lovci, a SDHP VP, also testified and agreed  
7 with Plaintiff’s termination for excessive absenteeism in violation of the attendance policy.  
8 Ms. Bryce testified that if HR learned that Plaintiff’s termination was based on her  
9 protected complaints, then an investigation would have been completed before  
10 terminating Plaintiff. However, Ms. Smith, the relevant HR representative, only  
11 postponed the termination in order to organize Plaintiff’s termination documents and  
12 final paycheck. Ms. Smith testified that HR’s review and approval was merely a formality  
13 as Ms. Sendra informed HR of her decision to terminate Plaintiff before the May 11 staff  
14 meeting. Moreover, Plaintiff has not demonstrated her termination due to excessive  
15 absenteeism was pretext for unlawful retaliation as she admits she exceeded the allowable  
16 absences limit under the policy. At this point, the Court finds Plaintiff’s retaliation claim  
17 lacks evidence of a causal link between her race discrimination complaints and the  
18 decision to terminate Plaintiff. Thus, the Court GRANTS summary judgment as to the  
19 retaliation claim.

20 Consequently, Plaintiff’s failure to prevent, wrongful discharge, unfair competition  
21 law claims premised on Plaintiff’s race discrimination and retaliation claims fail.

22 D. Harassment

23 Defendant argues that Plaintiff failed to exhaust her administrative remedies with  
24 respect to her harassment claim. Notwithstanding the jurisdictional bar to civil action,  
25 Defendants contend that Plaintiff did not sufficiently allege actionable harassment as the  
26 conduct here is neither severe nor pervasive.

27 Plaintiff asserts she established harassment because SDHP’s lack of action and its  
28 conduct in handling her complaints caused emotional distress and altered the conditions



1 of her employment. Doc. No. 68-1 at 20-21. Also, Plaintiff claims the findings by the  
2 EEOC investigation should be used in determining whether harassment existed here. Id.  
3 at 21.

4 In reply, Defendants point out that Plaintiff admits her EEOC charge alleges no  
5 claim of harassment. Doc. No. 20 at 8. Also, Defendants highlight that Plaintiff does not  
6 specifically identify any conduct that rises to the level of actionable harassment. Id.

7 Under FEHA and Title VII, a plaintiff must file an administrative complaint with  
8 either the Department of Fair Employment and Housing (DFEH) or the Equal  
9 Employment Opportunity Commission (EEOC) before filing suit. Cal. Gov. Code §  
10 12960(b), 42 U.S.C. § 2000e-5(f)(1). In a race harassment case, a plaintiff must show she  
11 was subject to unwelcome conduct, and such conduct was sufficiently severe or pervasive  
12 to alter the conditions of her employment and create a hostile working environment.  
13 Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998). In determining whether  
14 conduct is sufficiently severe or pervasive, courts will consider: (1) nature of the conduct;  
15 (2) the frequency of encounters; (3) the number of days over which the conduct occurred;  
16 and (4) the context in which the harassing conduct transpired. Etter v. Veriflo Corp., 67  
17 Cal.App.4th 457, 465 (1998) (citations omitted).

18 Here, Plaintiff does not identify any severe or pervasive conduct towards her on the  
19 part of SDHP staff based on her race which created a hostile work environment. Plaintiff  
20 never reported to SDHP management any alleged harassing conduct by a patient until  
21 May 11th. In view of the fact that Plaintiff did not work another day after May 11, her  
22 work environment was not actionably hostile. The only conduct Plaintiff alleges is the  
23 clerical error made where the scheduling clerk believed Plaintiff had taken time off and did  
24 not schedule her and one instance when Ms. Sendra contacted Plaintiff about a patient's  
25 complaint. The Court finds neither event sever nor pervasive enough to establish a prima  
26 facie case for harassment. After Plaintiff's E.E.O.C. investigation, Dana Bryce, VP of HR  
27 at SDHP, admitted that Plaintiff expressed concerns about being sent to families that were  
28 prejudiced. However, the Court does not have the results of the E.E.O.C. investigation

1 or any other evidence before it to infer Plaintiff suffered harassment while working at  
2 SDHP. Accordingly, the Court finds Plaintiff has not presented sufficient evidence to  
3 establish a harassment claim in that the evidence does not demonstrate she suffered severe  
4 and pervasive conduct. Therefore, the Court GRANTS defendants' motion for summary  
5 judgment as to the harassment claim.

6 CONCLUSION AND ORDER

7 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 8 1. Defendants SDHP, SDHF, and Kipperman's motion for summary judgment  
9 regarding joint employer liability (doc. no. 64) is DENIED; and  
10 1. Defendants SDHP, SDHF, and Kipperman's motion for summary judgment  
11 as to race discrimination (doc. no. 64) is GRANTED; and  
12 2. Defendants SDHP, SDHF, and Kipperman's motion for summary judgment  
13 as to retaliation (doc. no. 64) is GRANTED; and  
14 3. Defendants SDHP, SDHF, and Kipperman's motion for summary judgment  
15 as to harassment (doc. no. 64) is GRANTED.

16 Dated: May 23, 2016

17   
18 JOHN A. HOUSTON  
19 United States District Judge  
20  
21  
22  
23  
24  
25  
26  
27  
28



Jeffrey L. Kandel (CA Bar No. 115832)  
PACHULSKI STANG ZIEHL & JONES LLP  
10100 Santa Monica Boulevard, 13th Floor  
Los Angeles, CA 90067  
Telephone: 310/277-6910  
Facsimile: 310/201-0760  
Email: jkandel@pszjlaw.com

Attorneys for Liquidating Trustee and SDH Trust

**UNITED STATES BANKRUPTCY COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

In re:  
  
SAN DIEGO HOSPICE & PALLIATIVE CARE  
CORPORATION,  
  
Debtor.

Case No.: 13-01179-MM11

Chapter 11

**PROOF OF SERVICE**

I, Rolanda L. Mori, declare as follows:

I am a resident of and employed in the city and county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 10100 Santa Monica Blvd., 13th Floor, Los Angeles, California 90067.

On **October 21, 2016**, I caused to be served the following document(s):

**LIQUIDATING TRUSTEE'S MOTION FOR ORDER ESTIMATING CLASS  
CLAIM OF LEILANI ROSS FOR PURPOSES OF ALLOWANCE AND  
DISTRIBUTION; MEMORANDUM OF POINTS AND AUTHORITIES AND  
DECLARATIONS OF RICHARD M KIPPERMAN AND JEFFREY L. KANDEL IN  
SUPPORT THEREOF**

on the parties in this action as follows:



2 BY CM/ECF NOTICE OF ELECTRONIC FILING by causing such document(s) listed  
3 above to be served through this Court's electronic transmission facilities via the Notice of  
4 Electronic Filing (NEF) and hyperlink, to the parties and/or counsel who are determined  
5 this date to be registered CMIECF Users set forth below as identified on the service list  
6 obtained from this Court on the Electronic Mail Notice List..

- 7 • Jamie Altman jamie.altman@procopio.com, kristina.terlaga@procopio.com;lenore.joseph@procopio.com
- 8 • Everett G. Barry ebarry@mulvaneybarry.com, gcurtis@mulvaneybarry.com;ktran@mulvaneybarry.com
- 9 • Steven M. Berman SBerman@slk-law.com, sstirling@slk-law.com
- 10 • Jess R. Bressi jbressi@mckennalong.com, ksigismondo@mckennalong.com
- 11 • Steven K. Brumer sbrumer@brumerlawfirm.com
- 12 • Jeffrey D. Cawdrey jcawdrey@gordonrees.com, ebojorquez@gordonrees.com;slemos@gordonrees.com
- 13 • William R. Cumming cumming@cummingandassociateslaw.com
- 14 • Joseph R. Dunn jrdunn@mintz.com,  
15 tlmayo@mintz.com;jadavis@mintz.com;aobrient@mintz.com;dsjohnson@mintz.com;docketing@mintz.com
- 16 • Amir Gamliel agamliel@perkinscoie.com
- 17 • Thomas B. Gorrill tgorrill@gorillalaw.com
- 18 • Christopher V. Hawkins hawkins@sullivanhill.com,  
19 vidovich@sullivanhill.com;hill@sullivanhill.com;Iriarte@sullivanhill.com;stein@sullivanhill.com;cruz@sull  
20 ivanhill.com;millerick@sullivanhill.com;gubba-reiner@sullivanhill.com;ggarcia@sullivanhill.com
- 21 • Haeji Hong Haeji.Hong@usdoj.gov, USTP.Region15@usdoj.gov,tiffany.l.carroll@usdoj.gov
- 22 • Jeffrey Isaacs jeffrey.isaacs@procopio.com,  
23 gpk@procopio.com;kristina.terlaga@procopio.com;lenore.joseph@procopio.com;efile-bank@procopio.com
- 24 • Jeffrey Kandel jkandel@pszjlaw.com
- 25 • Teddy Kapur tkapur@pszjlaw.com
- 26 • Grant C. Keary gck@dlklaw.com
- 27 • Dean T. Kirby dkirby@kirbymac.com,  
28 jwilson@kirbymac.com;rrobinson@kirbymac.com;Jacquelyn@ecf.inforuptcy.com;hmares@kirbymac.com;f  
drummond@kirbymac.com;twright@kirbymac.com
- Andy Kong Kong.Andy@ARENTFOX.COM
- K Kenneth Kotler kotler@kenkotler.com
- Kristin Lamar  
klamarecf01@gmail.com,NChawlaecf01@gmail.com,IGN@NewChapterLaw.com,ecf@NewChapterLaw.co  
m
- Lynne R. Lasry llasry@slbv.com
- Paul J Leeds leedsp@higgslaw.com, reisingc@higgslaw.com
- Paul J Leeds leedsp@higgslaw.com, reisingc@higgslaw.com
- Samuel R. Maizel smaizel@pszjlaw.com, mkulick@pszjlaw.com
- Samuel R. Maizel smaizel@pszjlaw.com, mkulick@pszjlaw.com
- Scotta McFarland smcfarland@pszjlaw.com
- Dawn Messick dmessick@foley.com
- Elaine Nguyen Elaine@wsrlaw.net, megan@wsrlaw.net;tdorros@mrlp.com;Blake@lawbl.com
- Elaine Nguyen Elaine@wsrlaw.net, megan@wsrlaw.net;tdorros@mrlp.com;Blake@lawbl.com
- Martin W. Phillips marty.phillips@att.net
- Gerald N. Sims jerrys@psdslaw.com, bonniec@psdslaw.com
- Kelly Ann Mai Khanh Tran ktran@mulvaneybarry.com, lbrayton@mulvaneybarry.com
- Matthew Troy Matthew.Troy@usdoj.gov
- United States Trustee ustp.region15@usdoj.gov
- Stacie Yee stacie.yee@squiresanders.com, Bradley.Cosman@squiresanders.com;  
derek.judd@squiresanders.com

27 All other interested parties in this action that are not a registered ECF User are served as  
28 follows:

- 1 ☒ BY U.S. Mail by placing the document(s) listed above in a sealed envelope with postage  
2 thereon fully prepaid, in the United States Mail at Los Angeles, California addressed as  
3 set forth below.

4 ***PLEASE SEE ATTACHED SERVICE LIST.***

- 5 ☐ BY OVERNIGHT DELIVERY by causing such envelope(s) to be deposited in a box or  
6 other facility regularly maintained by Federal Express overnight delivery with fees paid.
- 7 ☐ BY ELECTRONIC SERVICE by causing document(s) to be electronically served on the  
8 interested parties in the above-referenced action. The transmission was reported as  
9 complete without error and a copy of the report will be maintained with the document by  
10 the sender.
- 11 ☐ BY FACSIMILE by causing the foregoing document(s) via facsimile transmission. The  
12 transmission was reported as complete without error and a copy of the report will be  
13 maintained with the document by the sender.

14 I declare under penalty of perjury that the documents were served by methods indicated  
15 above and the foregoing is true and correct.

16 Executed on October 21, 2016, at Los Angeles, California.

17 /s/ Rolanda L. Mori

18 Rolanda L. Mori

**In re San Diego Hospice & Palliative  
Care Corporation  
Case No. 13-01179 (MM11)  
2002 Service List**

**Debtor**

San Diego Hospice & Palliative Care  
Corporation  
2400 Historic Decatur Rd., #107  
Box 123  
San Diego CA 92106

Haeji Hong  
Office of the US Trustee  
402 West Broadway, Suite 600  
San Diego, CA 92101

Internal Revenue Service  
Insolvency Group 1  
880 Front Street  
San Diego, CA 92101

Internal Revenue Service  
Post Office Box 7346  
Philadelphia, PA 19101-7346

**Requests for Special Notice**

Attorneys for Brookwood Investors, LLC  
Joseph R. Dunn, Esq.  
Mintz Levin Cohn Ferris Glovsky and  
Popeo, P.C.  
3580 Carmel Mountain Road, Suite 300  
San Diego, CA 92130

John S. Kaplan, Esq.  
Perkins Coie LLP  
1201 Third Avenue, 48th Floor  
Seattle, WA 98101-3099

Jo Anne Bilodeau  
7727 Tommy Street, Apt. 21  
San Diego, CA 92119

Attorneys for Creditor Emergency and Acute  
Care Medical Corporation  
Grant C. Keary, Esq.  
Dunn, Lee & Keary  
26000 Towne Centre Drive, Suite 200  
Foothill Ranch, California 92610

Susan Dukes  
2120 Estela Drive  
El Cajon, CA 92020

Janine Sarti on behalf of Creditor  
Palomar Health  
Palomar Health Legal Services Dept  
15255 Innovation Drive  
San Diego, CA 92128

Angela M. Belgrove  
Assistant Regional Counsel  
Office of the General Counsel  
U.S. Dept. of HHS  
90 7th Street, Suite 4-500  
San Francisco, CA 94103-6705

Seth B. Shapiro, Trial Attorney  
U.S. Department of Justice – Civil Div.  
Commercial Litigation Branch  
1100 L Street, NW, Room 10012  
P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044

Attorneys for Connecticut General  
Life Insurance Co.  
Janet D. Gertz, Esq.  
Cooley LLP  
4401 Eastgate Mall  
San Diego, CA 92121

**Official Committee of Unsecured  
Creditors**

Robert Hirsh  
Arent Fox  
1675 Broadway  
New York, NY 10019

Outcome Resources LLC  
Attn: Martin McDonough, CEO  
2210 Plaza Dr. #300  
Rocklin, CA 95765

GlenBrook Skilled Nursing  
Attn: Darolyn Jorgensen-Kares  
1950 Calle Barcelona  
Carlsbad, CA 92009

Departure  
427 C Street, Suite 406  
San Diego, CA 92101

Brookwood Crossroads Investors, LLC  
Attn: Evelyn M. Murphy  
72 Cherry Hill Drive  
Beverly, MA 01915

Medline Industries, Inc.  
Attn: Shane Reed  
1 Medline Place  
Mundelein, IL 60060

---

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Gail J. Higgins  
Higgins Law Firm  
9021 Melrose Avenue, Suite 205  
West Hollywood, California 90069  
(310) 409-7080 / Fax: (310) 388-1018  
[ghigginse@aol.com](mailto:ghigginse@aol.com)

Gail Higgins  
1017 N. La Cienega Blvd., Suite 103  
West Hollywood, CA 90069

Daniel J. Weintraub/Elaine V. Nguyen  
Weintraub & Selth, APC  
11766 Wilshire Boulevard, Suite 1170  
Los Angeles, CA 90025  
(310) 207-1494/ Fax: (310) 442-0660  
[dan@wsrlaw.net](mailto:dan@wsrlaw.net)/[Elaine@wsrlaw.net](mailto:Elaine@wsrlaw.net)

Blake J. Lindemann  
Lindemann Law Firm, APC  
433 N. Camden Drive, 4<sup>th</sup> Floor  
Beverly Hills, CA 90210  
(310) 279-5269/ Fax: (310) 300-0267  
[blake@lawbl.com](mailto:blake@lawbl.com)